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THE LAWRENCE S. FLETCHER
MEMORIAL FUND

STANFORD SCHOOL OF LAW

PRACTICAL RULES

FOR

DETERMINING

PARTIES TO ACTIONS;

DIGESTED AND ARRANGED, WITH CASES.

BY HERBERT BROOM,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

FROM THE SECOND LONDON EDITION.

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PREFACE.

THE former edition of this work having, it is apprehended, become of little practical utility, in consequence of the numerous cases which have been decided, and the various important Statutes which have been enacted since its publication, relating to the subject of which it treats, I have been induced to revise it throughout, by cancelling those passages which seemed to require alteration, and by the substitution and insertion of much new matter. In the process of revision references have been added to more than four hundred cases, which have either been decided or reported during the period which has elapsed since this Treatise originally appeared. In its present form it will, I hope, be found useful as a hand-book for the practitioner, whether he be Special Pleader or Attorney, and as a Digest or Compendium of important Rules and Precepts for the Student. In the Appendix which has been added to this edition will be found some remarks as to the principles applicable in determining the liabilities of parties engaged in railway undertakings; these remarks, being offered rather as suggestions than as deductions from decided cases, could not, I thought, with propriety, be admitted into the body of the work, and must be received by the reader with a degree of caution proportioned to the diffidence with which they are submitted to his consideration.

Nov. 1846.

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PARTIES TO ACTIONS.

PART I.

PLAINTIFFS IN ACTIONS EX CONTRACTU.

CHAPTER I.

GENERAL RULES.

Distinction between the legal and equitable Interest, ss. 1, 2. Who should sue on a Contract under Seal, ss. 3—6. Joinder of Parties to a Contract under Seal, ss. 7—9. Who should sue after Assignment of Land or a Chattel Real, ss. 10—12. After Assignment of Personalty, s. 13. After Assignment of a Contract under Seal, ss. 14, 15. Who should sue on a simple Contract, ss. 16—19. Joinder of Parties to a simple Contract, ss. 20—24. Who should sue after Assignment of a simple Contract, ss. 25—27.

1. The accurate administration of justice requires, that the jurisdictions of the courts of law and of equity should be kept distinct;(*a*) hence it is a general rule, that the party seeking redress at common law for a breach of contract, must be the party legally, and not merely equitably interested therein;(*b*) for our courts *of law only consider legal rights—our courts of equity have other rules, by which they sometimes supersede those legal rules; and, in so doing, they act most beneficially for the subject.(*c*) [*2]

2. Hence, at law, no action lies by the cestui que trust against the trustee,(*d*) and the latter may set up the legal estate against the former; for, where there are two kinds of estates in different persons, the one equitable

(*a*) Per Lord Lyndhurst, C. B., Britten v. Perrott, 2 Cr. & M. 597. 602.

(*b*) Per Ashhurst, J., Goodtitle v. Jones, 7 T. R. 50; Doe d. Hodsden v. Staple, 2 T. R. 684. See Story, Eq. Pl. s. 76; Per Bayley, J., Randoll v. Bell, 1 M. & S. 722; Per Lord Alvanley, C. J., Johnson v. Johnson, 3 B. & P. 169; Doe d. Hughes v. Jones, 9 M. & W. 372.♦

(*c*) Per Lord Kenyon, C. J., Bauerman v. Radenius, 7 T. R. 663. 667; Foreman v. Jeyes, 5 B. & Ad. 837;ª and per Lord Lyndhurst, C. B., Britten v. Perrott, 2 Cr. & M. 601.

(*d*) Allen v. Imlett, Holt, N. P. C. 641; Mileham v. Eicke, 3 M. & W. 407;♦ post, s. 137.

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and the other legal, the person having the equitable estate must call in air the legal estate, before he can recover in a court of law.(*e*) And so, if a bond be given for payment of money to A., as trustee for B., the former must sue thereon, although the latter has an equity to use his name;(*g*) and, on a covenant to A. and B. jointly, for the benefit of A. who dies, B., and not A.'s representatives, must sue;(*h*) and although the cestui que trust may, after application to the trustee and the tender of a sufficient indemnity, bring an action *in his name;(*i*) yet the plaintiff on the record will be treated in all respects as the party in the cause, and any defence arising from his act or admission will in the absence of fraud or collusion be a defence against the cestui que trust suing in his name.(*k*)

[*3]

3. According to the principles of the common law and irrespective of the recent enactments relative to the transfer of real property, "where there is such a deed as is technically called a deed inter partes, that is, a deed importing to be between the persons who are named in it, as executing the same, and not as some deeds are, general to 'all people,' the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it, except by way of remainder; nor can any stranger sue upon any of the covenants it contains,"(*l*) even where the covenant is expressly for his benefit;(*m*) and if a party to the deed and a stranger are joint covenantees, it has been held that the latter cannot join in an action on the covenants.(*n*) Although where defendant by *deed assigned certain money not then due to A., in trust to pay B. a specified sum, and to retain the residue, and covenanted not to receive such money himself when due, an action for money had and received was held to be maintainable against defendant at the suit of B.(*o*) On a deed-poll, however, a stranger was held entitled to sue if expressly named therein.(*p*)

[*4]

4. So far as relates to hereditaments, however, the above distinction is now abolished; under an indenture executed after the 1st of October, 1845, an immediate estate and interest in any tenements or hereditaments, and

(*e*) Doe d. Shewen v. Wroot, 5 East, 137, 138; Goodtitle v. Jones, 7 T. R. 50, 51.

(*g*) Offly v. Warde, 1 Lev. 235; Shack v. Anthony, 1 M. & S. 575; Scholey v. Mearns, 7 East, 148; Lamb v. Vice, 6 M. & W. 472;[a] Evans v. Cromlington, Carth. 5.

(*h*) Anderson v. Martindale, 1 East, 497.

(*i*) See Spicer v. Todd, 2 Cr. & J. 166, per Lord Lyndhurst, C. B.; recognised, Orchard v. Coulsting, 6 Scott, N. R. 843; Auster v. Holland, 15 L. J., N. S., Q. B. 229.

(*k*) Gibson v. Winter, 5 B. & Ad. 96;[b] Bauerman v. Radenius, 7 T. R. 663. 666; Craib v. D'Aeth, Id. 670, n. (*b*); Alner v. George, 1 Camp. 392; May v. Taylor, 6 Scott, N. R. 974; Per Parke, B., Wilkinson v. Lindo, 7 M. & W. 87;[c] Alner v. George, 1 Camp. 392.

(*l*) Per Lord Ellenborough, C. J., Storer v. Gordon, 3 M. & S. 322; Barford v. Stuckey, 2 B. & B. 333;[c] Bushell v. Beavan, 1 Bing. N. C. 120;[d] Metcalfe v. Rycroft, 6 M. & S. 75; Platt on Covenants, 7.

(*m*) Ex parte Richardson, 14 Ves. jun. 187; Berkeley v. Hardy, 5 B. & C. 355.

(*n*) Lord Southampton v. Brown, 6 B. & C. 718.[e]

(*o*) Pooley v. Goodwin, 4 A. & E. 94.[f]

(*p*) Gilby v. Copley, 3 Lev. 139; Cooker v. Child, 2 Lev. 74; and see Berkeley v. Hardy, 5 B. & C. 357, 358,[g] where this distinction between a deed-poll and an indenture was laid down and admitted in the argument; Com. Dig. Covenant (A. 1.); Green v. Horne, 1 Salk. 197; Platt on Covenants, 5.

[a] Eng. Com. Law Reps. 27. [b] Id. 6. [c] Id. 27. [d] Id. 13. [e] Id. 31. [f] Id. 11.
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the benefit of a condition or covenant respecting them may be taken, although the taker thereof be not named as a party to the said indenture.(q)

5. In case of the non-execution of a deed inter partes by a covenantee, and party to the deed, such party is not thereby necessaarily prevented from suing on the covenants entered into with him; at all events he may do so, if there have not been a total failure of consideration; and even where the covenants by the respective parties are mutually dependent, it appears that the nominal consideration in the deed would be sufficient to support the action.(r) In the particular case of a lease, indeed, non-execution by the lessor prevents the relation of landlord *and tenant from being perfected according to the original intention of the parties; and, therefore, it is laid down broadly by some authorities(u) that "if a lease be agreed on, and the lessee executes his part, but the lessor does not execute his part, whereby there is not any lease, the covenants in the indenture sealed by the lessee, and also the bond for the performance of covenants, are void." But the proposition thus stated seems to require some qualification, because it is founded upon the assumption that "if the foundation of the covenant fails the covenant also fails;" a rule which, although true in the case of covenants mutually dependent, cannot be held generally applicable, inasmuch as a covenant, being under seal, does not by law require any consideration to support it. In a very recent case, moreover, which will be again adverted to, it was expressly held that the fact of non-execution of the lease by the lessor does not necessarily preclude him from suing upon the covenants in the lease.(v) [*5]

6. If an indenture of charter-party is made between A. and B. on the one part, and C. and D. on the other, with covenants on each side expressly made by and with A. and B., but A. alone seals on the one part, and C. and D. on the other; A. and B. may, nevertheless, join in an action against C. and D. for breach of one of the covenants:(x) and where joint covenantees, who have *not executed may join with those who have, they must do so, unless there be an allegation of their express disclaimer, renunciation, or refusal, for their assent is to be presumed.(y) Where a deed-poll is used, it need not be executed by the covenantee provided he be named therein.(z) [*6]

7. In determining as to the joinder or non-joinder of covenantees, attention must be paid to the nature of their legal interest as well as to the wording of the covenant; for, if the interest is joint, all the covenantees

(q) 8 & 9 Vict. c. 106, s. 5, repealing 7 & 8 Vict. c. 76, s. 11, as from the 1st October, 1745.

(r) Rose v. Poulton, 2 B. & Ad. 822;[h] Glazebrook v. Woodrow, 8 T. R. 366, cited 2 B. & Ad. 831, 832.[h]

(u) Com. Dig. Covenant, (F); per Lord Tenterden, C. J., Rose v. Poulton, 2 B. & Ad. 828;[i] Soprani v. Skurro, Yelv. 18, post, s. 28.

(v) Cooch v. Goodman, 2 Q. B. 580,[k] post, s. 28

(x) Clement v. Henley, 2 Roll. Ab. Faits, (F), 2; per Parke, J., 2 B. & Ad. 830;[l] Com. Dig. Covenant, (A. 1); Vernon v. Jefferys, 2 Stra. 1145; S. C. 7 Mod. 358.

(y) Petrie v. Bury, 3 B. & C. 353;[m] recognised Foley v. Addenbrooke, 4 Q. B. 208;[n] Scott v. Godwin, 1 B. & P. 67; Vernon v. Jefferys, 2 Stra. 1145; S. C. 7 Mod. 358.

(z) Platt on Covenants, 5, 7; ante, s. 4.

[h]Eng. Com. Law Reps. 22. [i]Id. 22. [k]Id. 42. [l]Id. 22. [m]Id. 9. [n]Id 45.

must join in bringing the action, and words of severalty shall not prevail;(a) the reason given for this rule being, that, if several, in such a case, were to bring actions for one and the same cause, the Court would be in doubt for which of them to give judment.(b) Therefore where A., by indenture, covenanted with several persons, and to and with each of them, that he was lawfully seised, it was held, that, notwithstanding the words of severalty, all the covenantees should join in suing on the covenant.(c) In like manner, where a covenant *was made to and with A., his executors, [*7] administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, it was held that, although the benefit to be derived from the performance of the covenant would enure to one only of the covenantees, yet both had a legal interest in the performance of it, and consequently on the death of A. the right of action on the covenant survived to B.(d) The principle which governed the decisions in the preceding cases was likewise applied by the Court of Queen's Bench in that of Hopkinson v. Lee,(e) which will well illustrate the rule under consideration, and where the facts were as follows:—By articles of agreement under seal, between the defendant of the one part, and the plaintiff and A. of the other part, after reciting that the defendant, as solicitor of one B., had applied to the plaintiff to lend to B. a sum of 2,900*l.* out of certain moneys of the said A. then in the plaintiff's hands in trust for A., on the security of certain stock in the funds and the covenant thereinafter contained; the defendant, in pursuance of the agreement, and in consideration of the premises, and of the plaintiff having advanced the sum of 2,900*l.* to the said B. at the request of the defendant, did covenant with and to the plaintiff, his executors, &c., and also as *a separate and distinct* [*8] **covenant* with and to the said A., her executors, &c., that he the defendant would pay the plaintiff, his executors, &c., the regular interest on the 2,900*l.* It was held that, notwithstanding the express words of severalty, the plaintiff could not sue upon the above covenant without joining A., the legal interest of the covenantees being joint.

8. We must next observe that where a man covenants with two or more persons, using words which primâ facie import a joint covenant, but which nevertheless admit of being construed severally, there, if the interest and cause of action of each of the covenantees appear on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be constructed to be a several covenant with each, and each covenantee may bring an action for his particular damage.(f) Where, therefore, a covenant, though joint in its terms, was for the payment of an annuity to each

(a) Servante v. James, 10 B. & C. 413,° arg.; Eccleston v. Clipsham, 1 Wms. Saund. 154, (1); Petrie v. Bury, 3 B. & C. 353;ᵖ Scott v. Godwin, 1 B. & P. 67; Bac. Ab. Cov. (D.); James v. Emery, 8 Taunt. 245;ᑫ S. C. 5 Price, 529.

(b) Per Lord Kenyon, C. J., 1 East, 501. (c) Slingsby's case, 5 Co. 18. b.

(d) Anderson v. Martindale, 1 East, 497, cited 14 M. & W. 573.♦

(e) 14 L. J., N. S., Q. B., 101, recognised per Parke, B., Bradburne v. Botfield, 14 M. & W. 564;♦ see also Wakefield v. Brown, Q. B., Trin. T. 1846, Law Times, Vol. vii. p. 450.

(f) Per Cur. Lane v. Drinkwater, 1 Cr., M. & R. 612; and supra, note (a); 1 Wms. Saund. 154, (1), and cases there cited; Wilkinson v. Lloyd, 2 Mod. 82; see Palmer v. Sparshott, 7 Scott, N. R. 743. 748.

°Eng. Com. Law Reps. 21. ᵖId. 10. ᑫId. 4. ♦Reprinted by T. & J. W. J. at $2 50 per vol.

of two persons, it was held that the interests of the covenantees were several, and that they should sue separately on the covenant.(*g*) So, where the covenant was with several for payment of the purchase-money of an estate by instalments in equal portions, it was decided that a party entitled to one such portion might sue alone on *the covenant.(*h*) By articles of agreement, reciting, that the defendant had contracted with A., as [*8 *a*] agent for the plaintiff, and others, for the purchase of certain lands at the several prices therein mentioned, the defendant covenanted, with plaintiff and the other parties beneficially interested, to perform such contract, by paying the purchase-money as agreed on; and it was held, that the interest of the parties was clearly several, and that plaintiff might, consequently, sue alone for his share of the purchase-money, without joining the other parties beneficially interested.(*i*) Likewise, where the covenant is to several, for the performance of several duties to each, the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach as far as his own interest extends.(*k*)

8 *a*. In several recent cases the law respecting the joinder of covenantees, or rather, the rule of construction applicable to covenants(*l*) has been much considered; and although some expressions at variance with each other have been made use of by the Courts of Queen's Bench and Exchequer, in delivering their *opinions with reference to this subject, yet it is [*8 *b*] believed that the following propositions will be found established by the cases already cited, and the additional authorities referred to below:(*m*) —I. Where the covenant is in its terms several, but the interest of the covenantees is joint, they *must* join in suing upon the covenant—this rule being in accordance with Slingsby's case and Martindale v. Anderson, both of which cases have been repeatedly recognised as law.

8 *b*. II. Where the covenant is in its terms *expressly and positively joint*, the covenantees must join in an action upon the covenant, although as between themselves their interest is several. "If," said Parke, B., in a recent case,(*n*) "you covenant with A., B., and C. jointly, and the survivor of them, they must sue jointly on the covenant. It follows from that, that if you join parties to the deed who have no interest, you cannot sever and sue separately." And again: "It is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing

(*g*) Withers v. Bircham, 3 B. & C. 254;[r] Lilly v. Hodges, 8 Mod. 166.

(*h*) James v. Emery, in error, 8 Taunt. 245;[r] S. C. 5 Price, 529; see Shaw v. Sherwood, Cro. Eliz. 729.

(*i*) Poole v. Hill, 6 M. & W. 835;[t] as to the mode of taking advantage of the non-joinder of a covenantee or obligee, see Cabell v. Vaughan, 1 Wms. Saund. 291, (*f*); Scott v. Godwin, 1 B. & P. 67.

(*k*) Per Lord Kenyon, C. J., Anderson v. Martindale, 1 East, 501; Slingsby's case, 5 Co. 18 b; 1 Wms. Saund. 155, (2); Platt on Covenants, 126, 127.

(*l*) See per Maule, J., Mills v. Ladbroke, 7 Scott, N. R. 1018.

(*m*) Bradburne v. Botfield, 14 M. & W. 559. 564. 572;[t] Hopkinson v. Lee, 14 L. J., N. S., Q. B. 101; Sorsbie v. Park, 12 M. & W. 146;[t] Foley v. Addenbrooke, 4 Q. B. 197. 207; Mills v. Ladbroke, 7 Scott, N. R. 1005. 1023. Per Parke, B., Wootton v. Steffenoni, 12 M. & W. 134.[t]

(*n*) See the judgment Bradburne v. Botfield, 14 M. & W. 564, 572,[t] the authority of which case was admitted by the Court of Queen's Bench in Harrold v. Whittaker, decided Trin. Term, May 26, 1846.

[r]Eng. Com. Law Reps. 10. [t]Id. 4. [t]Reprinted at $2 50 per vol.

for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one."

[*8 c] *8 *c.* III. Where the language of the covenant is *capable of being so construed*, it shall be taken to be joint or several, according to the interest of the covenantees.(*o*) "The result of the cases," observed Lord Denman, C. J., in Foley v. Addenbrooke,(*p*) "appears to be this, that, where the legal interest, and cause of action of the covenantees are several, they should sue separately, though the covenant be in joint terms; but the several interest and the several ground of action must distinctly appear." It follows from the last rule, that a covenant cannot by express words be made joint *and* several with the covenantees, where their interests are several; neither can it be so where their interest is joint, because the Court will construe a covenant so worded as several or joint according to the interest of the covenantees.(*q*)

9. When one of several joint covenantees or obligees dies, the survivors, and not the personal representatives of the deceased, must sue, with an aver-

[*8 d] ment in the *declaration of his death;(*r*) whereas, on a joint and several bond, or on a several bond or covenant, the representatives of a deceased covenantee or obligee may sue in respect of his several interest.(*s*)

10. After assignment of land, or of a chattel real,(*t*) in other cases than between landlord and tenant, it seems clear that, when the assignee of the covenantee is owner of the land to which the covenants relate, he has a right to sue on such as run therewith,(*u*) provided he be in of the same estate as the original grantee or covenantee;(*x*) the latter party, however, may sue in respect of the privity of contract, although not owner of the land to which the covenants relate.(*y*)

11. Where an express covenant runs with the land, as a covenant for title, it is not necessary that the assignee be expressly named therein, in order to entitle him, being owner of the land, to sue on the covenant; and

[*9] this remark applies also to the heir, who may be considered as *an assignee,(*r*) and who is entitled to sue even for a breach of covenant

(*o*) Judgment, 14 M. & W. 572.♦

(*p*) 4 Q. B. 207. By a covenant "joint in terms," it is presumed that his Lordship means a covenant primâ facie joint.

(*q*) Judgment, 14 M. & W. 573.♦ In Bradburne v. Botfield, ante, the question, whether one of several lessors being tenants in common can sue on a covenant to repair made with all, was expressly raised on demurrer, but was not decided, the Court observing, "There is no decisive authority either way. That all *could sue* is perfectly clear," citing Kitchen v. Buckly, Sir T. Raym. 80; S. C. 1 Lev. 109; Judgment, Foley v. Addenbrooke, 4 Q. B. 208.[t] Wakefield v. Brown, Q. B., Trin. T. 1846; Law Times, vol. vii. p. 450; post, s. 32.

(*r*) Rolls v. Yate, Yelv. 177; affirmed in error, 1 Bulst. 25, 26; Scott v. Godwin, 1 B. & P. 74; 1 Wms. Saund. 154, (1); Anderson v. Martindale, 1 East, 497.

(*s*) Withers v. Bircham, 3 B. & C. 254;[u] Shaw v. Sherwood, Cro. Eliz. 729.

(*t*) The right of the assignee is the same in either case: Campbell v. Lewis, 3 B. & Ald. 396,[x] in error, affirming Lewis v. Campbell, 8 Taunt. 227; Noke v. Awder, Cro. Eliz. 373, 436.

(*u*) Spencer's case, 5 Co. 16; Middlemore v. Goodale, Cro. Car. 503; Co. Litt. 385, a.

(*x*) As to this rule, see Roach v. Wadham, 6 East, 289; and how to obviate its consequences, 1 Smith's Leading Cases, 1st ed. 31.

(*y*) Stokes v. Russell, 3 T. R. 678; affirmed in error, 1 H. Bla. 562; post, s. 46.

(*r*) Spencer's case, 5 Co. 16; Co. Litt. 385. a.; Com. Dig. Covenant, (B. 3); Derisley v. Custance, 4 T. R. 75.

[t]Eng. Com. Law Reps. 45. [u]Id. 10. [x]Id. 5. ♦Reprinted at $2 50 per vol.

in the ancestor's lifetime, provided no actual damage were sustained by the ancestor;(*s*) as on a covenant for further assurance with the ancestor, and refusal to levy a fine at his request, in consequence of which refusal the heir was evicted after the ancestor's death.(*t*) So, the devisee is assignee of the testator, and may sue for breach of a covenant in a conveyance by defendant to the testator, that the defendant was lawfully seised, and had a good right to convey; for such covenant runs with the land: and though the breach occurred in the testator's lifetime, yet it is a continuing breach in the time of the devisee; and it is sufficient to allege for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously.(*u*)

12. It must be observed, however, that, as a general rule, this right of the assignee is confined to such breaches of covenant as are committed subsequent to the assignment and during the continuance of his estate as assignee;(*x*) therefore, where a mortgagee died during the continuance of the mortgage term, but after default by the mortgagor, and by will bequeathed the mortgage money to plaintiff, who was likewise appointed his executor; it was held that plaintiff could not maintain *covenant as assignee of the term in respect of such default by the mortgagor, for this [*10] was a personal covenant, collateral and not running with the land, and the breach complained of occurred in testator's lifetime.(*y*)

13. The preceding observations are confined to covenants relative to land or a chattel real, for it is a rule that covenants do not run with personalty.(*z*) Hence a covenant in a charterparty to pay freight is not transferred to the assignees of the ship by a bill of sale made during the voyage.(*a*) And where A., seised in fee of certain premises, conveyed them to defendant and another, in trust to pay a certain rent to A., his heirs and assigns; and defendant covenanted with A., his heirs and assigns, for the payment of the said rent, which was subsequently demised by A. to plaintiff for a long term; it was held that plaintiff could not sue defendant in covenant for non-payment of the rent, for there was neither privity of contract nor privity of estate.(*b*) Nor can the assignee of an apprentice, according to the custom of the city of London, sue on the covenants in the indenture of apprenticeship to which he is no party, for custom cannot make an assignee so as to entitle him to sue.(*c*)

14. It is a well-established principle of law, that choses in action are not assignable, so as to entitle the assignee *to sue thereon in his own name;(*d*) and even in equity it is usual, if it be not always indis- [*11]

(*s*) 1 Sugd. V. & P. 10th ed. 371, and 2 Id. 458, and cases there cited, post, s. 129.
(*t*) Jones v. King, 4 M. & S. 188, affirming judgment in King v. Jones, 5 Taunt. 418.r
(*u*) Kingdon v. Nottle, 4 M. & S. 53.
(*x*) Lewes v. Ridge, Cro. Eliz. 863; Com. Dig. Covt. (B. 3.)
(*y*) Canham v. Rust, 2 Moore, 164.
(*z*) Spencer's case, 5 Co. 16, 3rd Resolution; Seddon v. Senate, 13 East, 63.
(*a*) Splidt v. Bowles, 10 East, 279.
(*b*) Milnes v. Branch, 5 M. & S. 411; but covenant in such a case, and not debt, is the proper form of action by the covenantee; Randall v. Rigby, 4 M. & W. 130,* and the cases there cited; post, s. 172.
(*c*) Barker v. Beardwell, 1 Show. 4; Com. Dig. Covt. (B. 3).
(*d*) 2 Bla. Com. 442.

rEng. Com. Law Reps. 1. *Reprinted by T. & J. W. J. at $2.50 per vol.

pensable, to make the assignor holding the legal title a party to the suit, as well as the assignee, who is beneficially interested.(e) We shall at present consider the above rule in connexion with specialties only, and to the instances of personal covenants just considered, may be added that of a bond conditioned for the payment of money, on which the obligee alone can sue;(g) though forbearance for a given time, on the part of the assignee of a bond, to sue the obligor in the obligee's name is a good consideration for a promise, by the obligor, to pay or to give a warrant of attorney for the amount at the expiration of the time agreed on.(h) However, the right of suing in his own name has been conferred, by statute, on the assignee of a bail bond;(i) though such a bond, given by a party attached for not putting in an answer in Chancery, is not within the statute.(k) So, a replevin bond (unless perhaps when it contains a condition to indemnify the sheriff(l)) may be assigned to the avowant and party making cognizance, either jointly or separately;(m) and *the assignee of an India bond may sue thereon in his own name.(n)

[*12]

15. So, it has been decided that the assignee of an Irish judgment by cognovit, may sue in this country as well as in Ireland, in his own name;(o) that the assignee of a respondentia bond may maintain assumpsit for money had and received against the obligor, the latter having beforehand engaged, by an indorsement on the bond, to pay the same to any assignee,(p) though clearly an action could not have been maintained on the bond; and that, if the members of a corporate body be ousted, but the corporation be subsequently revived, such corporation, when revived, may sue on a bond given to it during its previous existence;(q) but this latter case is no exception to the general rule, the old corporation not having been totally dissolved and annihilated.(r)

16. We shall next consider who is the proper party to sue on simple contracts, written or verbal; and on *these it appears a settled rule that that party should be made the plaintiff from whom the *considera-*

[*13]

(e) Story, Eq. Pl. ss. 153, 154.

(g) 2 Bla. Com. 442; Bac. Ab. Obligations, (A); Wake v. Tinkler, 16 East, 36; but the assignee of a Scotch bond may maintain assumpsit here in his own name: Innes v. Dunlop, 8 T. R. 595.

(h) Morton v. Burn, 7 A. & E. 19,[a] and Forth v. Stanton, 1 Wms. Saund. 210 n. (1), where the cases are collected.

(i) 4 Ann. c. 16, s. 20. (k) Meller v. Palfreyman, 4 B. & Ad. 146.[b]

(l) Meyers v. Lockwood, 11 Law Journ., N. S., Q. B. 47.

(m) 11 Geo. 2, c. 19, s. 23; Phillips v. Price, 3 M. & S. 180; Dias v. Freeman, 5 T. R. 195; Archer v. Dudley, 1 B. & P. 381, n. A replevin bond may be taken and assigned by one of the sheriffs of London in his own name only. Thompson v. Farden, 1 Scott, N. R. 275.

(n) 51 Geo. 3, c. 64, s. 4. As to an India certificate, Ex parte Thomson, 16 Ves. jun. 443.

(o) O'Callaghan v. Marchioness of Thomond, 3 Taunt. 82. But the Irish statutes 9 Geo. 2, and 25 Geo. 2, which permit the conusees of judgments to assign them, and the assigneees to sue in their own names, are confined to judgments by cognovit. Id.

(p) Fenner v. Meares, 2 W. Bla. 1269, recognised by Buller, J., in Master v. Miller, 4 T. R. 341, 342; and by Wilson, J., Israel v. Douglas, 1 H. Bla. 243. But see per Lord Kenyon, C. J., Johnson v. Collings, 1 East, 104; and see 14 East, 587, n. (a).

(q) Mayor of Colchester v. Seaber, 3 Burr. 1866.

(r) Per Lord Mansfield, C. J., 3 Burr. 1871.

[a] Eng. Com. Law Reps. 34. [b] Id. 24.

tion actually moved;(*s*) a sufficient legal consideration being defined to be "any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, if such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant."(*t*) "Consideration," according to Mr. Justice Patteson,(*u*) "means something which is of *some* value in the eye of the law, moving from the plaintiff. It may be some benefit to the plaintiff, or some detriment to the defendant; but, at all events, it must be moving from the plaintiff." It is moreover necessary to ascertain whether, under the particular circumstances, the consideration moved from the party in question as principal or as agent merely; for though the law requires in all cases a consideration moving from the plaintiff, yet it frequently happens that such a consideration is not shewn as moving directly from him, but through the agency and intervention of some other party;(*x*) and, as we shall hereafter see, the principal must in general sue, and not the agent.(*y*)

*17. The following cases will serve to illustrate the preceding remarks:—Where plaintiff stipulated to discharge A. from a portion of a debt due to himself, and permit B. to stand in his place as to that portion, defendant stipulating in return that B. should give plaintiff a promissory note; the consideration moving from plaintiff, being an undertaking detrimental to him, was held sufficient to sustain the promise by defendant.(*z*) In like manner, where certain money was due to the plaintiffs, who were attorneys, on their own account, and certain other money was due to A. B., their client, and thereupon, in consideration of forbearance the defendant undertook that the money so due should be paid, the plaintiffs were held to be sufficiently interested in the recovery of the sum due to A. B., to sue on the defendant's undertaking in their own names; they having induced their client to advance the money, having sued for it in her name, and then having stayed their proceedings on the defendant's promise to pay them the money. In this case, moreover, the client would have been unable to recover as against the defendant, except by suing in the names of her attorneys, with whom the agreement was entered into, and who would of course hold the amount when recovered as trustees for her.(*a*) [*14]

*17*a*. Where B., the country attorney of A., sent a sum of money to the defendants, who were his London agents, to be paid to C. on [*15]

(*s*) Crow v. Rogers, 1 Stra. 592; Price v. Easton, 4 B. & Ad. 433;[c] Lilly v. Hays, 5 A. & E. 548; Bourne v. Mason, 1 Ventr. 6; see Galloway v. Jackson, 3 Scott, N. R., 753-763.

(*t*) 1 Selw. N. P. 10th ed. 41; Kayne v. Dutton, 8 Scott, N. R. 495; Broom's Legal Maxims, 336, et seq.

(*u*) Thomas v. Thomas, 2 Q. B. 859.[d]

(*x*) Per Patteson, J., Lilly v. Hays, 5 A. & E. 550;[e] see Clark v. Dignam, 3 M. & W. 478.

(*y*) Post, s. 54; see the dicta per Buller, J., Marchington v. Vernon, 1 B. & P. 101, n. (*c*); Per Eyre, C. J., The Feltmakers' Company v. Davis, 1 B. & P. 102; Per Holt, C. J., Yard v. Eland, 1 Ld. Raym. 358; which seem to refer to the case of a promise to an agent for the benefit of a third party; Chitt. Contr. 3rd ed. 54, n. (2).

(*z*) Peate v. Dicken, 1 Cr. M. & R. 422.

(*a*) Harper v. Williams, 4 Q. B. 219.[f]

[c] Eng. Com. Law Reps. 24. [d] Id. 42. [e] Id. 31. [f] Id. 45.

account of A., and the defendants promised B. to pay the money according to his directions, but afterwards being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them: it was held, that an action for money had and received would not lie against the defendants at the suit of A. "The general rule," observed Lord Denman, C. J., in delivering judgment, "undoubtedly is, that there is *no privity* between the agent in town and the client in the country, and the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence." In order to render the town agents liable to the client it would be necessary to show either that the money was transmitted directly by the latter to the former, or that the country attorney received instructions to transmit it to them specifically; or some fact should be put in evidence, warranting the conclusion that the country attorney was a mere conduit-pipe for the transmission of the money to the town agents.(*b*)

17 *b*. In like manner, as remarked by Patteson, J., it would be a very wide proposition to lay down, that where money is paid to bankers in the country, and their town agent receives the money, and promises to pay it, it becomes money had and received by him to the use of the party to whom it was directed to be paid.(*c*) In such a case the action could not be [*16] *maintained by reason of the want of privity between the parties. So, if A., a broker, introduces B., another broker, to a shipowner in order that a charter-party which B. has the power of procuring may be effected with the shipowner, A. is by the custom of the trade entitled to half the commission paid to B. by the shipowner in respect of procuring the charter-party; but in such a case B. is the proper person to sue for the amount of commission, and A. cannot be joined as a co-plaintiff, there being no privity of contract between him and the shipowner.(*d*)

17 *c*. Where A. being indebted to the plaintiff in a certain amount, and B. being indebted to A. in another amount, the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.'s debt to the plaintiff, and A. gave such permission, whereupon defendant recovered from B.—judgment was arrested on the ground that plaintiff was a mere stranger to the consideration for defendant's promise, having done nothing of trouble to himself or of benefit to the defendant.(*e*) Where, however, the declaration stated, that the defendants, being in possession of certain mortgage deeds, of which A. was desirous to obtain an assignment by the payment of 500*l*., the plaintiff consented at A.'s request to accept bills to that amount, drawn by A., upon A.'s procuring the defendants to deliver the deeds to the plaintiff as a security; and that the defendants, in consideration of the plaintiff accepting the bills (but *without [*17] alleging any request on their part,) undertook to deliver the deeds to him, upon his paying them the amount of the bills: it was held that a sufficient consideration appeared for defendant's promise, as it must be inferred from the above statement that the act of the plaintiff and the

(*b*) Cobb v. Becke, 14 L. J., N. S., Q. B., 108; distinguishing Moody v. Spencer, 2 Dowl. & Ry. 6.
(*c*) Per Patteson, J., 14 L. J., N. S., Q. B., 110.
(*d*) Hill v. Kitching, C. P., Trin. T., June 8, 1846; Law Times, vol. vii., p. 257.
(*e*) Bourne v. Mason, 1 Ventr. 6.

promise of the defendant were simultaneous, taking place in the presence of the parties, and, therefore, rendering it unnecessary that the plaintiff should have acted at defendant's request.(*f*) Nor, in the case of a guarantee, need it be expressly stated that the consideration moved from the plaintiff, if such can be fairly intended.(*g*)

18. Formerly, however, it was held, that a stranger to the contract might, under particular circumstances, sue thereon; and perhaps the most remarkable case, in which it was so decided, was, where a tenant in fee-simple being about to cut down timber in order to raise a portion for his daughter, the defendant, his son and heir-at-law, promised the father, in consideration of his forbearing so to do, to pay such portion himself; and an action by the daughter's husband, and in her right, was held to lie against the son.(*h*)

19. The general rule being, that the party from whom the consideration moves, should be the plaintiff, seems *to hold, where the contract is founded upon a consideration to which each of several persons was a conducing party; and in such a case the action should be brought by all upon the promise to all, though for the benefit of one only.(*i*) [*18]

20. In determining the joinder of parties to simple contracts, the rule is, that all who have a joint legal interest, or are jointly entitled, must join, even though the contract be in terms several, or be entered into with one person only on behalf of all;(*k*) so that, where the consideration moves from several parties jointly, such parties, as having the joint legal interest, should be joined as plaintiffs in suing for a breach of contract.(*l*)

21. Hence, where the several cattle of A. and B. were distrained, and C., in consideration of 10*l.* to him paid by A. and B. jointly, promised to procure the re-delivery of the cattle, but failed in so doing; one joint action was held to lie at the suit of A. and B., the consideration being entire and indivisible.(*m*) So, where A. was entitled to certain shares in a ship, and B. and C. to the remaining *shares, and B. and C. employed defendant to sell the vessel, which he did, and paid over their proportion of the purchase-money, but declined to pay plaintiff without their concurrence: plaintiff suing alone was non-suited for the non-joinder of the other part-owners.(*n*) So, money advanced on the joint credit of two per- [*19]

(*f*) Tipper v. Bicknell, 3 Bing. N. C. 710. 715.[s]

(*g*) Dutchman v. Tooth, 5 Bing. N. C. 577.[b]

(*h*) Dutton v. Poole, 2 Lev. 210, and 1 Ventr. 318. 332; affirmed in error, Sir T. Raymond, 302. See the remarks on this case, Barford v. Stuckey, 2 B. & B. 336, 337,[i] and the argument in Price v. Easton, 4 B. & Ad. 433;[k] and see Carnegie v. Waugh, 2 D. & R. 277; per Lord Alvanley, C. J., Pigott v. Thompson, 3 B. & P. 149.

(*i*) Chanter v. Leese, 4 M. & W. 295, 312;[♦] affirmed in error, 5 M. & W. 698.[♦]

(*k*) 2 Wms. Saund. 116, (2); Owston v. Ogle, 13 East, 538; Hill v. Tucker, 1 Taunt. 7; Townsend v. Neale, 2 Camp. 190; Com. Dig. Abatement, (E. 12.) The Fishmongers' Company v. Staines, 6 Scott, N. R. 120; as to the mode of taking advantage of non-joinder of a necessary party as plaintiff, see 1 Wms. Saund. 291, *f.*

(*l*) Chanter v. Lease, 4 M. & W. 295;[♦] affirmed in error, 5 M. & W. 698;[♦] Coryton v. Litheby, 2 Wms. Saund, 116, *a* (2).

(*m*) Bac. Ab. Actions in General, (C.); see other cases, 2 Wms. Saund. 116, *a* (2).

(*n*) Hatsall v. Griffith, 2 Cr. & M. 679; and Break v. Douglas, cited by Parke, B., Id. 681; Graham v. Robertson, 2 T. R. 282.

[s] Eng. Com. Law Reps. 32. [b] Id. 35. [i] Id. 6. [k] Id. 24.
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sons, and paid over to satisfy a judgment against them, must be recovered by them jointly from a third party.(*o*)

21 *a*. Where an order of reference named two arbitrators, and gave them power to nominate an umpire, and they in the first place proceeded to nominate a third party:—Held, that an action lay at suit of the three referees for the costs of the award against the defendants, who had promised to pay them such costs.(*p*) And where a handbill was issued offering a reward of 100*l*. for the recovery of a stolen parcel and containing these words, "Whoever will give such information as will lead to the immediate recovery of the above parcel with its contents safe if lost, or the early apprehension of the guilty parties if stolen, shall receive the above *reward:" the Court observed that, according to the true construction of this advertisement, the information must be given with a view to its being acted on, either to the person offering the reward or his agent, or some person having authority by law to apprehend the criminal; and it appearing that the first communication was made by the plaintiff to C. in the course of conversation, but that the information which led to the apprehension of the guilty party was communicated to a constable by the plaintiff and C. jointly, it was held, that they ought both to have joined in an action brought for recovering the reward.(*q*)

[*20]

22. Where, however, the interest is separate and distinct, the parties so interested cannot maintain a joint action ex contractu. Therefore, two of three persons, who have entered into a joint and several bond in a matter in which they are severally interested, cannot, on payment of the bond, join in suing the third for contribution;(*r*) and, where a guarantee was given to three persons, and the interest of two of them, as determined by the situation in which all the parties stood in relation to the transactions out of which the guarantee arose, was separate and distinct in kind from that of the third, it was decided that the latter was rightly omitted as a plaintiff in suing on the guarantee.(*s*)

[*21]

*22 *a*. It follows from the rule already stated as to the joinder of parties in actions upon parol contracts, that a party having *no* legal interest in the cause of action cannot join in suing with one who has such interest. For instance, A., a wharfinger, received malt from and for B., and B. made a colourable sale of this malt to C. B. afterwards became bankrupt, and his assignees sued C. in trover for the malt. Pending the dispute it was agreed between A., C., and the assignees of B., that the malt should be sold, and the proceeds paid into a bank, except a part, which A. was to retain on account of an alleged lien against B. The assignees sub-

(*o*) Osborne v. Harper, 5 East, 225. A covenant by A., not to sue for any debt due to him from defendant cannot be pleaded as a release in bar of an action by A. and B. for a debt due to them jointly; Walmesley v. Cooper, 11 A. & E. 216;[l] but one of several joint plaintiffs may release a joint debt, or may settle the action. Jones v. Yates, 9 B. & C. 532;[m] Wallace v. Kelsall, 7 M. & W. 264. 272,♦ which cases are recognised in Gordon v. Ellis, 8 Scott, N. R., 305.

(*p*) Hoggins v. Gordon, 3 Q. B. 466;[n] see also Hawkins v. Benton, 15 L. J., N. S., Q. B. 139; S. C. 14 Id. 177.

(*q*) Lockhart v. Barnard, 14 M. & W. 674.♦ See also Thatcher v. England, 10 Jurist, 597. (*r*) Kelby v. Steel, 5 Esp. 194. See Brand v. Boulcott, 3 B. & P. 235.

(*s*) Place v. Delegal, 4 Bing. N. C. 426;[o] Palmer v. Sparshott, 4 Scott, N. R., 743.

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sequently abandoned the action against C., on his giving up a part of the proceeds, and it appearing that A. had in fact no such lien as alleged, A. was sued by C. for money had and received to his use. It was held that this action was rightly brought, and that the assignees could not have been joined as plaintiffs, they having no interest in the money sought to be recovered from A.(*t*)

23. It is likewise a consequence of the preceding rules that, when a contract may be treated either as joint or as several, either all must join, or each sue alone in respect of his several interest; and where one of several persons, who have a joint right of action, dies, the right then vests in the survivors to the exclusion of the personal representatives of the deceased.(*u*)

*24. It may be proper to observe here that although partners cannot in general sue each other,(*x*) yet an action is maintainable in [*22] many cases by one party against another similarly circumstanced, and having a similar interest, to enforce contribution; as, by one co-surety in a bond against another,(*y*) or by one defendant against a co-defendant, after a joint judgment in an action ex contractu,(*z*) provided the contract declared on were not entered into with the defendants as partners in trade.(*a*) So, an action lies at suit of a shipowner against the owner of the cargo for his proportion of general average,(*b*) and of ship's stores necessarily thrown overboard after capture by the enemy;(*c*) and at suit of the proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, against the shipowner for a loss by jettison;(*d*) or against another proprietor to recover contribution in the nature of general average.(*e*)

24 *a*. Where the plaintiff and the defendant had executed as sureties a warrant of attorney given as a *collateral security for a sum of [*22 *a*] money advanced on mortgage to the principals, and on default being made by the principals judgment was entered upon the warrant of attorney, and execution issued against the plaintiff for the amount of the principal money and interest, which, together with the costs of the execution, was paid by him: it was held, that the plaintiff might recover contribution from his co-surety in an action for money paid.(*f*) And where four persons who had acted as directors of a proposed railway company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility:—Held, that one of the four who had paid the attorney's bill was entitled to sue the others for contribution, on showing that in the retainer of the attorneys the plaintiff, the defendant, and the other two parties were contracting, independently of the com-

(*t*) Betteley v. Reed, 4 Q. B. 511.[p]
(*u*) Jones v. Yates, 9 B. & C. 538;[q] post, s. 86. (*x*) Post, s. 73.
(*y*) Toussaint v. Martinnant, 2 T. R. 100; and per Buller, J., Id. 105; Browne v. Lee, 6 B. & C. 689;[r] Cowell v. Edwards, 2 B. & P. 268; Decker v. Pope, Selw. N. P., 10th ed. 72, n. (28).
(*z*) Blackett v. Weir, 5 B. & C. 387;[s] Holmes v. Williamson, 6 M. & S. 158.
(*a*) Sadler v. Nixon, 5 B. & Ad. 936;[t] post, s. 73.
(*b*) Birkley v. Presgrave, 1 East, 220. (*c*) Price v. Noble, 4 Taunt. 123.
(*d*) Gould v. Oliver, 4 Bing. N. C. 134,[u] and cases there cited.
(*e*) Dobson v. Wilson, 3 Camp. 480.
(*f*) Kemp v. Finden, 12 M. & W. 421. See Price v. Carter, 14 L. J., N. S., Q. B. 140.

[p]Eng. Com. Law Reps. 45. [q]Id. 17. [r]Id. 13. [s]Id. 12. [t]Id. 27. [u]Id. 33.

pany.(g) The plaintiff and the defendant were purchasers of two separate underleases of two adjoining houses, held under one original lease at one entire rent; the plaintiff, having paid the whole of the rent reserved by the original lease for a year and a half to the representatives of the assignee of the reversion, under a threat of distress, sued the defendant for his proportion of the rent due in respect of the house held by him, as money paid by the plaintiff to his use:—Held, that the action would not lie, there being no [*22 b] evidence that the money *sought to be recovered was money paid to the use of the defendant.(h)

25. We shall next consider in what cases the assignee of a chose in action (not being a specialty) may sue thereon in his own name; for, although the assignment of a chose in action or contract may be a sufficient consideration for a promise,(i) yet as a general rule any action upon a contract in which the beneficial interest has been assigned must be brought in the name of the assignor. For instance an interest in a partnership is not assignable at law, so as to enable the assignee to sue as a co-partner; but nevertheless, the law will take notice that an interest in a partnership is a thing of value, and it may be made the subject of a valid contract.(k) Where the drawer of a ticket in a Derby lottery sold it to the plaintiff before the race, and the horse named in it was ultimately declared to be the winner: it was held, that an action for money had and received would not lie by the plaintiff against the stakeholder, there being no privity of contract originally between these parties, and the assignment of a chose in action not giving to the assignee a right of action.(l)

25 *a*. It might be supposed that considerable inconvenience would result [*22 c] from the strictness with which the *rule of law just stated is observed; but it must be borne in mind that the assignment of a debt is, in general, perfectly legal as between the assignor and assignee, and although an action for the recovery of the debt must be brought in the name of the former, yet he will hold the amount when recovered as trustee for the assignee. In practice, moreover, a debt is frequently recovered in the name of the assignor for the benefit of the assignee, when, from the peculiar facts of the case, no action could have been maintained by the last-named party against the debtor. Thus, A., B., and C. are shareholders and co-partners in a mercantile concern, which stops payment, being at the time of stoppage indebted to D. and other creditors. A., being largely interested in the concern, and anxious to effect a speedy adjustment of its affairs, gives security to a certain bank for advances to be made by them for the purpose of liquidating the various claims upon the company in which he is interested. Out of these advances D. is paid, who thereupon assigns the debt due to him from the firm to a trustee on behalf of A.:—An action may now be maintained against B. and C., who are shareholders in the insolvent concern, in the name of D., and the amount of the said debt may thus be recovered for the benefit of A., who could not

(g) Edgar v. Knapp, 6 Scott, N. R., 707. (h) Hunter v. Hunt, 1 C. B. 300.
(i) Per Buller, J., Master v. Miller, 4 T. R. 341; Price v. Seaman, in error, 4 B. & C. 525. 528;[x] Com. Dig. Action upon the Case upon Assumpsit, (B. 3).
(k) See per Maule, J., Tempest v. Kilner, 15 L. J., N. S., C. P., 11.
(l) Jones v. Carter, 15 L. J., N. S., Q. B., 96. See also Doe d. Williams v. Evans, 1 C. B. 717.

[x] Eng. Com. Law Reps. 10.

sue his co-partners at law. Nor can payment be pleaded by B. and C. in defence to such an action; for the transaction amounts in law to a purchase of the debt due to D., and not to payment.(*m*) *It will, no doubt, occur to the reader that by a similar process debts are recovered from, and contribution enforced against, members of the committees of projected railway and other companies, which could not be recovered or enforced in any form of action at suit of any individual being a co-partner in the undertaking. Both the above and other cases which may suggest themselves will be found confirmatory and explanatory of the general rule that a chose in action cannot be assigned at law.(*n*) [*22 *d*]

26. However, the assignment of a debt will in certain cases give to the assignee a right of action in his own name for its recovery. If A. owes B. 100*l.* and B. owes C. 100*l.*, and the three meet, and it is agreed between them that A. shall pay C. the 100*l.*, B.'s debt is extinguished, and C. may recover that sum against A.;(*o*) for the discharge and extinguishment of B.'s debt is a good consideration for A.'s promise to C.;(*p*) in such a case, moreover, it is not necessary that the amount due from A. to B. should, at the date of the agreement between the parties, be exactly ascertained; it will be sufficient if A. promise to pay C. such amount *when* ascertained,(*q*) or if specified, out of a fund of uncertain *amount.(*r*) In the example given above, the parties interested are supposed to agree expressly to the proposed arrangement, and it seems clear that in order to give to the assignee of the debt a right of action at law for its recovery in his own name, the debtor must consent to the agreed transfer of the debt;(*s*) but in order to constitute a good *equitable* assignment of a debt, it is sufficient if there be an engagement by the debtor that a particular fund shall be charged with or appropriated to the payment of the debt.(*t*) Where A., being indebted to B., and C., authorised B. to repay himself out of the net proceeds of certain shipments on his (A.'s) account, and after so doing, to pay a moiety of the residue (if not exceeding a specified amount) to C., who agreed to guarantee B. against claims by any other parties: it was held, that such a transaction was either a valid appropriation or equitable assignment of funds [*22 *e*]

(*m*) See M'Intyre v. Miller, 13 M. & W. 725.♦ As to the meaning of "payment," Id. Baillie v. Moore, 15 L. J., N. S., Q. B., 169; Maillard v. The Duke of Argyll, 6 Scott, N. R. 938.

(*n*) See in addition to the cases cited supra, Johnson v. Collings, 1 East, 104; Fairlie v. Denton, 8 B. & C. 400;[y] Howell v. M'Ivers, 4 T. R. 690; 2 Bls. Co. 442; Story, Eq. Pl. ss. 153, 154.

(*o*) Per Buller, J., Tatlock v. Harris, 3 T. R. 180: Fairlie v. Denton, 8 B. & C. 395. 400;[y] Wharton v. Waller, 4 B. & C. 166.[z] See also Israel v. Douglas, 1 H. Bl. 239.

(*p*) Com. Dig. Action upon the Case upon Assumpsit, (B. 1, 3).

(*q*) Crowfoot v. Gurney, 9 Bing. 372.[a]

(*r*) Crowfoot v. Gurney, 9 Bing. 372;[b] George v. Tibbits, 5 A. & E. 107,[c] and cases there cited; and see Carvalho v. Burn, 4 B. & Ad. 382,[d] affirmed in error, 1 A. & E. 883,[e] recognized, Lewis v. Edwards, 7 M. & W. 303. 306;[f] D'Arnay v. Chesnean, 13 M. & W. 796.♦

(*s*) The assent of C. is necessary to effect the extinguishment of B.'s debt, Chitt. Contr. 3d ed. 614; and B.'s assent is necessary for the like reason as regards A. See per Best, J., Wilson v. Coupland, 5 B. & Ald. 232;[g] Cuxon v. Chadley, 3 B. & C. 591.[z]

(*t*) Per Lord Denman, C. J., in George v. Tibbits, supra.

[y] Eng. Com. Law Reps. 15. [z] Id. 10. [a] Id. 23. [b] Id. 23. [c] Id. 31. [d] Id. 24. [e] Id. 28. [f] Id. 7. [g] Id. 10. ♦Reprinted at $2.50 per vol.

to the specified amount, in favour of C., and was not subsequently revoked by A.'s bankruptcy.(*u*)

27. In addition to the instances above given of the assignment of a chose in action, we may observe that *bills of exchange(*x*) are assignable by mercantile usage recognized by the common law;(*y*) and that promissory notes are made so by statute,(*z*) both kinds of instrument being payable to a particular individual, or to a particular individual or his order, or, generally, to bearer. It has been held, that, where a promissory note is payable by instalments, subject to a condition that on default being made in payment of the first instalment, the whole amount shall become immediately payable, the note is assignable within the stat. 3 & 4 Ann. c. 9; and on default being made by the maker in payment of the first instalment an indorser is liable for the whole amount.(*a*) It has been laid down, also, that an indorsement in blank conveys a joint right of action to as many as agree in suing on the bill without proving a partnership between them; but that, if a bill be indorsed specially to a firm, evidence must be given that the firm consists of the persons who sue as plaintiffs.(*b*) In an *action by the indorsee against the drawer of a bill of exchange, a plea, which stated that the bill was delivered to the plaintiff and B. as joint discounters of the said bill, "and not to plaintiff solely or alone, or with the intention of vesting in him a sole, separate, and exclusive right of action on the bill severally and apart from B." was held bad, as showing no defence to the action.(*o*)

[*22 f] [*22 g]

[*22 h]

*CHAPTER II.

1. LANDLORD AND TENANT, ss. 28—53.
2. PRINCIPAL AND AGENT, ss. 54—72.
3. PARTNERS—CORPORATIONS—COMPANIES, ss. 73—93.

1.—Landlord and Tenant.

Right of the Landlord to sue, s. 28—28 *b*. Where several parties are interested in the demised Premises, s. 29. Where the Parties interested are Joint Tenants, Coparceners,

(*u*) Hutchinson v. Heyworth, 9 A. & E. 375;[h] Walker v. Rostron, 9 M. & W. 411;[♦] Dickinson v. Morrow, 14 M. & W. 713.[♦]

(*x*) 2 Bla. Com. 466, 467; per Lord Abinger, C. B., 9 M. & W. 92; Hansard v. Robinson, 7 B. & C. 94.[i]

(*y*) It is important to observe the distinction between the transfer of the right of property and the transfer of the contract, ex. gr. the indorsement of a bill of lading transfers the right of property, but does not transfer the contract so as to enable the indorsee to sue upon it in his own name; Thompson v. Dominy, 14 M. & W. 403. As to the transfer of receipts or certificates given on payment of deposit in respect of foreign stock, Hennings v. Rothschild, 4 Bing. 332.[k]

(*z*) 3 & 4 Ann. c. 9, s. 1; 2 Bla. Com. 467, 468; Byles on Bills, 2nd ed. 3, 4.

(*a*) Carlon v. Kennedy, 12 M. & W. 139;[♦] Oridge v. Sherborne, 11 Id. 374.

(*b*) Per Lord Ellenborough, C. J., Ord v. Portal, 3 Camp. 239; Lowe v. Copestake, 3 C. & P. 300;[l] and see Machell v. Kinnear, 1 Stark. 499.[m]

(*o*) Wood v. Connop, 5 Q. B. 292.[n]

[h]Eng. Com. Law Reps. 36. [i]Id. 14. [k]Id. 13. [l]Id. 14. [m]Id. 2. [n]Id. 48.
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or Tenants in Common, ss. 30—34. Generally—who should sue after Assignment of the Reversion, ss. 35—40. Whether Mortgagor or Mortgagee should sue, ss. 41—44. When there is a joint Lease by Mortgagor and Mortgagee, &c. ss. 45—46 *b*. Who should sue after Assignment of Rent, s. 47. Who should sue after the Lessor's Death, ss. 48—50. Right of the Tenant to sue, ss. 51—53.

28. For all breaches of that duty which a tenant owes to his landlord, and which arises either from implication of law or from express agreement or covenant, the latter is necessarily the proper party to sue. With respect to the question whether, under any and what circumstances, an action of covenant can be maintained by a lessor who has not executed the lease against a lessee who has executed, and has occupied under the lease, it seems that as between the *immediate* parties to the deed the rule laid down in Comyn's Digest(*a*) will apply, viz., "If one party executes his part of an indenture, it shall be his deed, though the other does not execute his part." At all events, the law was thus declared in a very recent case,(*b*) where, in answer to *the argument that if the lease be not executed by the lessor, there is no demise, and no consideration for the covenants by the lessee, the Court observed, that "a covenant, being under seal, does not by law require any consideration to support it, and though an illegal consideration may be shown, and will vitiate it, and if a consideration be stated on the face of a deed a different one may be proved, in order to raise a legal defence; yet a mere failure of consideration which once existed may have no more effect than a total want of consideration in the first instance. Several cases are cited in Com. Dig. Covenant (F), to show that under circumstances a failure of consideration will prevent an action of covenant from being maintainable, and we are by no means prepared to deny this proposition." [*22 *i*]

28 *a*. In the judgment from which the above extract is taken several cases were cited to which it may be advisable shortly to refer. (1). Berkeley v. Hardy,(*c*) which, in fact, merely decided that a covenantee, who was *not* a party to the indenture of lease, could not sue upon the covenants entered into with him; (2). Cardwell v. Lucas,(*d*) where it was held that the assignee of a lessor who has not executed the lease cannot sue upon the covenants contained in it; (3). Rose v. Poulton,(*e*) which was not an action between landlord and tenant, and where the covenants were in gross and unconnected *with any interest in land. These cases then are clearly distinguishable from that of Cooch v. Goodman, above referred to. It must be admitted, however, that the judgments in them contain several passages(*f*) which appear irreconcileable with the law as there laid [*22 *k*]

(*a*) Faits (C. 2.)

(*b*) Cooch v. Goodman, 2 Q. B. 580.[o] In Doe d. Marlow v. Wiggins, (4 Q. B. 376,)[p] Patteson, J., says "Cooch v. Goodman was a very peculiar case. All that the Court decided there was, that the action might lie, though the deed was not executed by the covenantees. It was not held that an interest passed by the deed, or that it amounted to a lease; and the case went off upon another point." See Aveline v. Whisson, 4 M. & G. 801.[q]

(*c*) 5 B. & C. 355.[r] (*d*) 2 M. & W. 111. (*e*) 2 B. & Ad. 822.[s]

(*f*) See per Holroyd, J., 5 B. & C. 358;[t] per Parke, B., 2 M. & W. 117; and Judgment, Id. 123. Per Ld. Tenterden, C. J., (2 B. & Ad. 828,[u]) where that learned judge says, "Whether an entire failure of consideration will in all cases relieve a party from the obligation of his deed, it is not necessary at present to inquire. In the case of a lease not executed by the lessor it certainly does, because, in default of such execution there is no lease."

[o]Eng. Com. Law Reps. 42. [p]Id. 45. [q]Id. 43. [r]Id. 11. [s]Id. 22. [t]Id. 11. [u]Id. 22.

down, and which, equally with the proposition stated in Soprani v. Skurro,(*g*) will require modification, if the recent decision of the Court of Queen's Bench be correct. We may also notice the case of Wilson v. Woolfryes,(*h*) where *non est factum* was pleaded to a declaration in covenant, alleging that A., B., C., and D. by indenture demised, and it appearing on production of the demised part that two of these four alone executed the lease, the variance was held fatal, and the plaintiffs were nonsuited. Lastly, we may remark, that if the performance of any particular covenant by the lessee were made expressly dependent upon the execution of the lease by the lessor, it seems clear that the last-named party could not sue upon that covenant without having previously executed the lease, for to such a case the principle of the decision in Glazebrook v. Woodrow,(*i*) would be applicable.

[*23] 28 *b*. Where there has been an assignment of the reversion *the grantor retains his right of action against a tenant for rent accrued due,(*b*) or breach of covenants,(*c*) committed previously thereto, though for a breach of a covenant running with the land subsequent to the assignment the assignee must sue ;(*d*) and by the grant of the reversion in part of an estate such covenants become apportioned, and the grantor may still sue in respect of his residue of such estate,(*e*) though a condition, being in the nature of a penalty or forfeiture and entire, cannot be apportioned by the act of the parties.(*g*) The right also of suing on covenants personal to the covenantor, and not annexed to the estate, remains vested in him after an assignment of the reversion.(*h*)

29. Where several parties are interested in the demised premises, their joinder or severance must in general be determined by considering whether their interest is in its nature joint or several, and whether there be an express contract by the tenant with them jointly; so that where a purchaser occupied premises pursuant to certain conditions of sale, and paid interest on the purchase money "as and for rent," but the vendors had no common legal interest in any portion of such premises, and there was no proof of any joint contract with them either express or implied; it was held that they could [*24] not *join in an action for use and occupation.(*i*) Where the reversion in lands leased to defendant was conveyed to A. and B., and the heirs of B., in trust for A. and his heirs, and A. alone sued defendant for breach of a covenant to repair; it was held, on general demurrer, that such covenant was, by operation of law, with A. and B. jointly as assignees of the reversion, and that A. who showed in his declaration a joint title, ought

(*g*) Yelv. 18, cited Com. Dig. Covenant (F.), where it is laid down broadly that non-execution by the lessor renders void the covenants in the lease.

(*h*) 6 M. & S. 341. (*i*) 8 T. R. 366, cited 2 B. & Ad. 831, 832.[a]

(*b*) The remedy by distress is of course determined, for this is incident to the reversion 2 Bla. Com. 42.

(*c*) Midgley v. Lovelace, Carth. 289.

(*d*) Thursby v. Plant, 1 Wms. Saund. 241 b, n. (6,) ad finem.

(*e*) Twynman v. Pickard, 2 B. & Ald. 105. 112.

(*g*) Per Bayley and Holroyd, JJ., 2 B. & Ald. 109, 110. 112; Dumpor's case, 4 Co. 119 b.

(*h*) Harper v. Burgh, 2 Lev. 206; Middlemore v. Coodale, Cro. Car. 503. See Beely v. Parry, 3 Lev. 154.

(*i*) Seaton v. Booth, 4 A. & E. 528.[x]

[x]Eng. Com. Law Reps. 22. [w]Id. 31.

to have averred the death of B., which could not be intended in order to support the declaration.(*k*)

30. Joint-tenants being seised per mie and per tout, and deriving by one and the same title must sue jointly on their joint lease, and they must joint in debt or in an avowry for rent.(*l*) The effect of such a joint lease is, that each demises his own share,(*m*) and each may put an end to that demise so far as it operates upon his own share, whether his companions will join with him in putting an end to the whole lease or not;(*n*) and in the case of a joint demise by joint tenants, upon a tenancy from year to year, it is laid down that the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please, and as soon as any one of the joint tenants gives a notice to quit, purporting to be given on behalf of all *he effectually puts an end to that tenancy. The tenant has a right upon such a notice to give up the whole, [*25] and unless he comes to a new arrangement with the other joint tenants as to their shares, he is compellable so to do.(*o*) A joint tenant may also make a separate lease of his share either to a companion or to a stranger,(*p*) before doing which he should sever the tenancy;(*q*) and he may recover in ejectment on his separate demise, for such demise operates as a severance of the tenancy.(*r*) An ejectment also lies by one joint tenant, coparcener, or tenant in common, against his companion on actual ouster.(*s*)

31. Coparceners being connected together by unity of interest and title, constituting but one heir, and having but one estate among them, must in general like joint tenants sue jointly,(*t*) as on a joint lease for years,(*u*) or in an avowry for rent arrear;(*x*) and an action for *money had and received is not maintainable by one coparcener against an agent [*26] who collected the entire rents of the estate held in coparcenery for his share of such rents.(*y*) In ejectment by coparceners, the demise may, and it appears ought to be laid by all jointly;(*z*) but if so laid, it cannot be supported as the several demise of one or more of the lessors whose title is

(*k*) Scott v. Godwin, 1 B. & P. 67.
(*l*) Bac. Ab. Joint Tenants, (K); Com. Dig. Abatement, (E. 9.)
(*m*) Co. Litt. 186, a.
(*n*) Per Ld. Tenterden, C. J., Doe d. Aslin v. Summersett, 1 B. & Ad. 140, citing Doe d. Whayman v. Chaplin, 3 Taunt. 120, and Right d. Fisher v. Cuthell, 5 East, 491.
(*o*) Per Ld. Tenterden, C. J., Doe d. Aslin v. Summersett, 1 B. & Ad. 140,[a] recognized in Doe d. Kindersley v. Hughes, 7 M. & W. 139; Alford v. Vickery, 1 C. & Marsh. 280;[b] see Goodtitle d. King v. Woodward, 3 B. & Ald. 689;[c] Doe d. Elliott v. Hulme, 2 Man. & Ryl. 433.
(*p*) Bac. Ab. Leases, (I. 5.)
(*q*) Bac. Ab. Joint Tenants, (H. 2); Woodfall, L. & T. 4th ed. 6, n. (*c*).
(*r*) Roe d. Raper v. Lonsdale, 12 East, 39; Doe v. Marsack v. Read, 12 East, 57. 61; Doe d. Lulham v. Fenn, 3 Camp. 190.
(*s*) Woodfall, L. & T. 4th ed. 789.
(*t*) Co. Litt. 164, a., 180, b.; Com. Dig. Parcener, (A. 3, 4); Abatement, (E. 8). See per Tindal, C. J., Decharms v. Horwood, 10 Bing. 529; 2 Bla. Com. 187, 188.
(*u*) Selw. N. P. 10th ed. 714.
(*x*) Stedman v. Bates, 1 Ld. Raymond, 64; Per Tindal, C. J., 10 Bing. 529.[d]
(*y*) Decharms v. Horwood, 10 Bing. 526.
(*z*) Selw. N. P. 10th ed. 714, n. (20); Per Littledale, J., Doe d. De Rutzen v. Lewis, 5 A. & E. 289;[e] Boner v. Juner, 1 Ld. Raymond, 726. See the argument, 3 Camp. 191.

[a] Eng. Com. Law Reps. 20. [b] Id. 41. [c] Id. 5. [d] Id. 25. [e] Id. 31.

proved at the trial:(a) and in ejectment for breach of a condition in a lease, an opinion was intimated in a recent case, that coparceners to whom the reversion descended should have joined, on the ground that the condition could not in their case be apportioned.(b)

32. Where the parties demising are tenants in common, their joinder or severance in an action against their tenant, will depend on the nature of the thing sued for, and the interest which they have in it.(c) They should therefore join in suing in debt for rent, if reserved entire on their joint lease;(d) though if there be no joint demise or a separate reservation of [*27] rent to each, there must be separate actions or avowries;(e) and the *same rule applies in an action for double value, for holding over under the stat. 4 Geo. 2, c. 28.(g) No case appears to have laid it down generally that tenants in common must join in covenant; the utmost that has been established seems to be, that they *may* join in those actions of covenant which are merely personal, and in which the damages are severable, as on a covenant to repair or to procure the renewal of letters-patent.(h)

33. If, after a joint demise by tenants in common, notice be given to pay the rent in each and equal shares, and such payment be made accordingly, it will be a question for the jury, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each;(i) but payment of the entire rent to one tenant in common, contrary to express notice from the other, will be no discharge as to the latter.(k)

34. Tenants in common cannot join in a demise in ejectment; and the [*28] reason of this is, that they hold by distinct titles,(l) or by one title and by several rights;(m) *and where tenants in common join in a lease it operates as the lease of each for their respective parts.(n) Where, however, one entire rent had been paid by the tenant of trustees of a charity to their common clerk, this was held sufficient to support an ejectment on their joint demise, although the defendant proved that such trustees were appointed at different times, as evidence that they were tenants in common;(o) and if the thing sued for by tenants in common is in its nature

(a) Doe d. Blight v. Pett, 11 A. & E. 842.[f]
(b) Doe d. De Rutzen v. Lewis, 5 A. & E. 277. 289;[g] but see Doe d. Gill v. Pearson, 6 East, 173. (c) Ante, s. 7; and see s. 34, ad finem.
(d) Com. Dig. Abatement, (E. 10); Midgley v. Lovelace, Carth. 289, where it was held, that devisees, who were tenants in common of the reversion, might join or sever in debt or covenant for rent due under a lease from the devisor; and see 2 Bla. Com. 16th ed. p. 194, n. (10), and Litt. s. 316.
(e) Com. Dig. Abatement, (E. 10); Per Holt, C. J., Martin v. Crompe, 1 Lord Raymond, 340; Per Abbott, C. J., Powis v. Smith, 5 B. & Ald. 851.[h]
(g) Wilkinson v. Hall, 1 Bing. N. C. 713;[i] Cutting v. Derby, 2 W. Bla. 1077.
(h) Per Tindal, C. J., Simpson v. Clayton, 4 Bing. N. C. 781; Midgley v. Lovelace, Carth. 289; Kitchen v. Buckley, T. Raymond, 80; S. C. 1 Lev. 109. Ante, p. 8 c, note (q). (i) Powis v. Smith, 5 B. & Ald. 850.
(k) Harrison v. Barnby, 5 T. R. 246.
(l) Doe d. Poole v. Errington, 1 A. & E. 750;[j] Blackasper's case, cited, Id. 755; Litt. s. 311; 2 Bla. Com. 194; Mantle v. Wollington, Cro. Jac. 166; Morris v. Barry, 1 Wils. 1; Moore v. Fursden, 1 Show. 342; Heatherley v. Weston, 2 Wils. 232.
(m) Co. Litt. 189, a. (n) Woodfall, L. & T. 4th ed. 6.
(o) Doe d. Clarke v. Grant, 12 East, 221.

[f] Eng. Com. Law Repr. 39. [g] Id. 31. [h] Id. 7. [i] Id. 27. [k] Id. 33. [j] Id. 28.

entire, as in a quare impedit, or in detitnue for a chattel, they must of necessity join in the action.(*p*) Covenant lies by tenants in common of a house, for not repairing, against a lessee who, after the demise, but before the breach alleged, became a co-tenant with the plaintiffs in the same house.(*q*)

35. The rights of the grantee of a reversion seem to have been by no means defined by common law. It was admitted that he would have a right to sue the tenant for the rent which might be reserved, because that was incident to the reversion;(*r*) and that covenants in law would also pass with the reversion.(*s*) But it seems the better opinion, that the assignee of the reversion in the land devised derives his right to sue, on express covenants contained in the lease, from the stat. 32 H. 8, *c. 34, and not from the common law.(*t*) The operation of this statute, [*29] which gives to the assignee the same remedy by action of covenant as the lessor possessed,(*u*) is, however, confined to such covenants as run with the land;(*x*) and for breach of these, not only the assignee of the entire reversion, but also the assignee of part of the reversion, as of the reversion for life, or years, may sue.(*y*) The assignee, however, of the entire reversion in part only of the estate, though he may sue for breach of covenants(*z*) cannot enter for a condition broken; because the latter cannot be apportioned by the act of the lessor.(*a*)

36. Without attempting to enumerate the various covenants which have been held to run with the land, we may refer to one recent case in which A. and B. (his wife), being seised of one undivided moiety of certain premises in right of the wife, and C., being seised of the other moiety, jointly demised to D., who covenanted with A. and C. to repair; on this covenant, it seems that the assignee of the reversion could not sue; at all events *he could not do so without averring in the declaration that [* 30] the breach occurred in the lifetime of the wife.(*b*)

37. The case of the devisee of land being included in that of the assignee, falls within the statute:(*c*) and in like manner, the remainder-man may sue in covenant on a lease granted by tenant for life, in pursuance of a leasing power in testator's will; for the remainder-man, though not assignee of the lessor, is assignee of the devisor, from whom, as creating the power,

(*p*) Bac. Ab. Joint Tenants, (K.); Co. Litt. 197, b.
(*q*) Yates v. Cole, 2 B. & B. 660.[m] (*r*) Post, s. 57.
(*s*) Coote, L. & T. 314; Woodfall, L. & T. 4th ed. 168; Harper v. Burgh, 2 Lev. 206; Per Bayley, J., Vyvyan v. Arthur, 1 B. & C. 414.[n]
(*t*) Thursby v. Plant, 1 Wms. Saund. 240, n. (3), and n. (*o*), 5th ed.; Co. Litt. 215, a.; 3 Bla. Com. 158; and see note to Spencer's case, Smith's Leading cases, Vol. I. Quære. Whether the stat. 32 Hen. 8, c. 34, extends to leases not under seal. Brydges v. Lewis, 3 Q. B. 603.[o] See 7 & 8 Vict. c. 76, s. 4, and 8 & 9 Vict. c. 106, s. 3.
(*u*) 32 H. 8, c. 34, s. 1. See Pyot v. Lady St. John, Cro. Jac. 329; Collins v. Harding, Cro. Eliz. 606. 622.
(*x*) Spencer's case, 5 Co. 16, ad finem; 3 Bla. Com. 16th ed. 158, n. (10).
(*y*) Co. Litt. 215, a.; Matures v. Westwood, Cro. Eliz. 599. 617; Kidwelly v. Brand, 1 Plow. 69; Bac. Ab. Covenant, (E. 5); Attoe v. Hemmings, 2 Bulstr. 281; Burton v. Barclay, 7 Bing. 745. (*z*) Twynam v. Pickard, 2 B. & Ald. 105.
(*a*) Co. Litt. 215, a.; Dumpor's case, 4 Co. 119, b.; Pain v. Mallory, Cro. Eliz. 832.
(*b*) Wootton v. Steffenoni, 12 M. & W. 129. 184; Fryer v. Coombs, 4 P. & D. 119, note. See Harrold v. Whittaker, Q. B., May 26, 1846; L. T., vol. vii. p. 280.
(*c*) 3 Bla. Com. 16th ed. 158, n. (10); Sacheverell v. Froggatt, 2 Saund. 367; Roe d Bamford v. Hayley, 12 East, 464. 466; Woodfall, L. & T. 4th ed. 193.

[m] Eng. Com. Law Reps. 5. [n] Id. 8. [o] Id. 43.

the lease must be considered to emanate.(*d*) So, where plaintiff claimed as mortgagee for a term demised under a power to mortgage, given by testator's will to his executors, and defendant held under a lease from the tenant for life, executed in pursuance of a leasing power in the same will, but posterior to a grant by such tenant for ninety-nine years out of his life estate; it was held, that the demise to plaintiff must operate as if created by the will, and therefore override the grant for ninety-nine years; that the lease (supposing the leasing power not to be suspended by the grant) would in like manner override it, in any case not affecting the lessee's interest; and, as a consequence of the preceding, that the mortgagee was entitled to sue the lessee of the tenant for life in covenant, as assignee of the reversion.(*e*)

[*31] 38. It must be borne in mind that the covenants, being *incident to the reversion were, prior to the recent Statutes 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, extinguished by the merger of the particular reversion to which they were incident,(*f*) but now by s. 9 of the last-mentioned Act when the reversion expectant on a lease made either before or after the passing of that Act of any tenements or hereditaments shall, after the 1st of October 1845, be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall to the extent, and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender and merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

39. Since the covenants in the lease are incident to the reversion, it follows, in cases to which the above statute does not apply, that the assignee of the reversion cannot maintain covenant, unless he is assignee of that particular reversion to which the covenants in the instrument declared on are annexed:(*g*) and therefore the devisee in remainder cannot sue on the covenants annexed to the reversion expectant on a mere lease at will from testator, for the tenancy thereby created was determined by the lessor's death.(*h*) In the case of an under-tenancy, however, the stat. 4 Geo. 2, c.

[*32] 28, s. 6, provided that the chief lease might be *surrendered and a new one taken, without a surrender of the underleases, and that the rights and remedies of all parties should be the same as if there had been no such surrender.(*i*)

40. The assignee cannot as a general rule sue for a breach of covenant anterior to the assignment; though, if there be a continuing breach, as of a covenant to repair, he may sue after notice, notwithstanding the premises were out of repair before his particular estate commenced. But where a lessee, who had covenanted to repair, held on after the expiration of his

(*d*) Isherwood v. Oldknow, 3 M. & S. 382; and per Le Blanc, J., Id. 401, 402.
(*e*) Bringloe v. Goodson, 4 Bing. N. C. 726.[p]
(*f*) See Webb v. Russell, 3 T. R. 393; Burton v. Barclay, 7 Bing. 745;[q] Wootley v. Gregory, 2 Y. & J. 536; Thorn v. Woolcombe, 3 B. & Ad. 586;[r] Sturgeon v. Wingfield, 15 L. J., N. S., Ex. 212.
(*g*) Per Lord Abinger, C. B., Cardwell v. Lucas, 2 M. & W. 111. (*h*) Id.
(*i*) See Doe d. Palk v. Marchetti, 1 B. & Ad. 715. 721;[s] Sturgeon v. Wingfield, 15 L. J., N. S., Ex. 212; Lewis v. Ridge, Cro. Eliz. 863; Flight v. Bentley, 7 Sim. 149.

[p] Eng. Com. Law Reps. 33. [q] Id. 20. [r] Id. 23. [s] Id. 20.

term, the premises then being out of repair, it was held, that the assignee who purchased subsequently could not sue either on an implied assumpsit to put the premises in the same state as they were in at the commencement of the term, or in covenant for breaches committed before he purchased the reversion;(k) and it seems that debt for use and occupation previous to the assignment of the reversion, on a parol demise, cannot be maintained by the assignee of the reversion against the lessee.(l)

41. It is clear that the mortgagor cannot, after executing the mortgage, maintain ejectment against the *tenant, for he has no longer the legal title;(s) neither can the mortgagee, if there be a valid lease or [*33] demise subsisting,(t) in which case it is laid down, that the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had, and his remedy must be on the lease as assignee of the reversion as long as the lease is in existence, and the tenant acknowledges his title,(u) and, after giving notice of the mortgage to the tenant, the mortgagee is entitled to rent then in arrear and subsequently accruing, and may distrain for it.(x)

42. Secondly, where, in a recent case, a term of 1000 years, to lead the uses of a recovery, was vested in trustees in trust to sell or mortgage for payment of money advanced by B., and the next use was declared to be to A. for life, with a leasing power, and then another term was granted to one of the trustees upon trust to levy certain sums by sale or mortgage; and A. exercised the leasing power prior to an assignment of the two terms by the trustees to B., in consequence of non-payment of the mortgage-money; it was held that, in point of law, the lease was contemporaneous with the creation of the term of 1000 years, because referable to the instrument creating the power under which it was made; that the trustees were the reversioners entitled to the rent reserved by the lease; and that B., as their assignee, was subsequently, in like manner, entitled to and might distrain for it.(y)

*43. Thirdly, when the mortgage is anterior to the commencement [*34] of the tenancy under the mortgagor, the mortgagee may recover in ejectment against the tenant without giving notice of his mortgage;(z) and by giving such notice, it was held, in the cases of Pope v. Biggs and Waddilove v. Barnett, that he entitled himself to the rents then due and subsequently accruing;(a) but that in order to defeat an action by the mortgagor for rent under such circumstances, the tenant must plead specially as to so much as

(k) Johnson v. St. Peter's, Hereford, 4 A. & E. 520.[c]

(l) Mortimer v. Preedy, 3 M. & W. 602; see Brydges v. Lewis, 3 Q. B., 603,[d] which was an action by the assignee of the reversion on a lease from the assignor which was not sealed. By 8 & 9 Vict. c. 106, s. 3, every lease previously required by law to be in writing must now be by deed.

(s) Doe d. Marriott v. Edwards, 5 B. & Ad. 1065.[e]

(t) See per Patteson, J., Partington v. Woodcock, 6 A. & E. 696.[f]

(u) Per Lord Denman, C. J., Rogers v. Humphreys, 4 A. & E. 313.[g]

(x) Moss v. Gallimore, 1 Dougl. 279.

(y) Rogers v. Humphreys, 4 A. & E. 299.[h]

(z) Leech v. Hall, 1 Dougl. 12, and cases collected in note to Id. Smith's Leading Cases, Vol. I.; Thunder v. Belcher, 3 East, 449; Rogers v. Humphreys, 4 A. & E. 299. 313. 314.[b]

(a) Pope v. Biggs, 9 B. & C. 245.[a]

[c]Eng. Com. Law Reps. 31. [d]Id. 43. [e]Id. 27. [f]Id. 33. [g]Id. 31. [h]Id. 31. [a]Id. 17.

was actually due at the period of the receipt of the notice, although the general issue is sufficient as to such as accrued due afterwards.(*b*) But it has more recently been held that notice from the mortgagee cannot ipso facto render the tenant of the mortgagor tenant of the mortgagee at the old rent, although a new tenancy might, by payment and acceptance of rent or otherwise, be created under the same terms as existed by virtue of the previous demise ;(*c*) further, that the tenant's attornment is at *least necessary to create the relation of landlord and tenant; and that a subsequent recognition by the tenant of the mortgagee as landlord could not have the effect of setting up the mortgagee's title by relation from the period when notice was given.(*d*) Where the mortgagor of a house became bankrupt, and then, by the assent of his assignees, let it as a ready-furnished house; and the tenant subsequently received notice from the mortgagee to pay the rent to him: it was held, either that the rent might be apportioned, or that a new agreement, on the part of the tenant, might be inferred by the jury, to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount, as a compensation for the use of the furniture to the assignees.(*e*)

[*35]

44. Thus much then seems established, that, as between mortgagor and mortgagee, the latter may, after default in payment of the mortgage money, treat the mortgagor as a trespasser, and bring ejectment without a previous demand of possession, or he may treat him as being rightfully in possession; and himself as reversioner ;(*g*) and although, as between mortgagee and *lessee no interest passed by a lease from the mortgagor posterior to the mortgage, and the mortgagee may, if he thinks fit, bring ejectment against the lessee without notice, it is clear that he has also the option of adopting the act of the mortgagor, and such adoption, coupled with the assent of the tenant, is sufficient to create a new tenancy between the mortgagee and lessee.(*h*) And where, in such a case, notice of the

[*36]

(*b*) Waddilove v. Barnett, 2 Bing. N. C. 538.[d] In the previous case of Alchorne v. Gomme, 2 Bing. 54,[e] it was held that a plea setting forth a mortgage prior to the tenancy, and notice from the mortgagee, was bad, as equivalent to a denial of the landlord's title. But a plea of payment to a mortgagee, under a mortgage prior to the demise, in consequence of a demand by him accompanied with threats, is, in substance, a plea of payment, and not of nil habuit, and therefore good. Johnson v. Jones, 9 A. & E. 809.[f]

(*c*) Partington v. Woodcock, 6 A. & E. 690;[g] and per Patteson, J., Id. 695; Rogers v. Humphreys, 4 A. & E. 313;[h] Doe d. Higginbotham v. Barton, 11 A. & E. 307. 315.[i] See Doe d. Hughes v. Bucknell, 8 C. & P. 566.[k]

(*d*) Per Lord Denman, C. J., Evan v. Elliot, 9 A. & E. 353, 354;[l] Wheeler v. Branscombe, 5 Q. B. 373.[m] In Gladman v. Plumer (15 L. J., N. S., Q. B., 79) it did not appear when the tenancy commenced; but the tenant attorned to the mortgagee, who was held entitled to distrain. See also Newport v. Harley, 14 L. J., N. S., Q. B., 242.

(*e*) Salmon v. Matthews, 8 M. & W. 827. See Rawson v. Eicke, 7 A. & E. 451.[n]

(*g*) Doe d. Higginbotham v. Barton, 11 A. & E. 314,[o] recognised Claridge v. M'Kenzie, 4 Scott, N. R., 813; per Parke, B., Hitchman v. Walton, 4 M. & W. 415; Partridge v. Bere, 6 B. & Ald. 604;[p] Doe d. Garrod v. Olley, 12 A. & E. 481,[q] recognized Doe d. Snell v. Tom, 4 Q. B. 615;[r] Doe d. Roby v. Maisey, 8 B. & C. 767.[s] See per Patteson, J., Doe d. Jones v. Williams, 5 A. & E. 297;[t] per Rolfe, B., Tew v. Jones, 13 M. & W. 14.

(*h*) See per Tyndal, C. J., Brown v. Storey, 1 Scott N. R. 16; Evans v. Elliot, 9 A. & E. 354—356;[u] Doe d. Higginbotham v. Barton, 11 A. & E. 307. 314;[x] Judgment,

[d]Eng. Com. Law Reps. 29. [e]Id. 9. [f]Id. 36. [g]Id. 33. [h]Id. 31. [i]Id. 39. [k]Id. 34. [l]Id. 36. [m]Id. 48. [n]Id. 34. [o]Id. 39. [p]Id. 7. [q]Id. 40. [r]Id. 45. [s]Id. 15. [t]Id. 31. [u]Id. 36. [x]Id. 39.

assignment of a mortgage was given to the lessee by the assignees, who required payment to them of all rent due and to become due, it was held that this was evidence whence the jury might infer a contract of tenancy for a year, at the previous rent, as between the lessee and the mortgagees, and that the fact of the lessee's assent (this having been assumed by all parties at the trial) need not have been submitted to the jury.(*i*) In the case just referred to the fact of assent was *assumed*. It must be borne in mind, however that the relation of landlord and tenant can only be created by a contract assented to by both parties; and whether such a contract existed either expressly or impliedly, reference being *had to the conduct of the parties, will be a question for the jury. The mortgagee's [*37] right to distrain, or to bring an action for use and occupation, will, of course, depend upon the existence of such a contract; and in the absence of evidence to shew its existence his remedy against the tenant occupying the land must be by ejectment.(*k*)

45. In the case of a joint lease by mortgagor and mortgagee, the demise, in an ejectment against the tenant, must be in the name of the latter, if brought after default and before the mortgage is paid off—if brought after payment, in that of the former; but a joint demise cannot be laid, for there is no joint interest in the parties.(*l*) And the same principle applies, if there be a joint lease by tenant for life and remainder-man, which operates during the life of the tenant as his demise confirmed by the remainder-man and afterwards as the demise of such last-mentioned party.(*m*)

46. As between the lessor and lessee, it is clear that the lessee cannot plead to an action for breach of covenant by the lessor, that the latter had, at the date of the indenture of demise, only an equitable estate in the premises, for this would be tantamount to a plea of *nil habuit in tenementis*; in such a case the lease during its continuance operates by way of estoppel; and if the lessor subsequently acquires the legal estate in the land *demised, the lease by estoppel becomes a lease in interest, and the relation of landlord and tenant will exist as perfectly as if the [*38] lessor had been actually seised of the land at the time when the lease was made.(*n*) It seems, however, that a lessee will not be estopped from shewing that the lessor's interest in the land had ceased before the breach of covenant complained of, as that he was only seised in right of his wife, and that she died before covenant broken.(*o*)

46*a*. The question whether or not the assignee of a reversion by estoppel

Birch v. Wright, 1 T. R. 382. In the case of trustees and cestui que trust, see Vallance v. Savage, 7 Bing. 595.

(*i*) Brown v. Storey, 1 Scott, N. R., 9; ante (*d*).

(*k*) See per Tindal, C. J., 1 Scott, N. R. 16; Gladman v. Plumer, 15 L. J., N. S., Q. B., 79; Evans v. Elliot, 9 A. & E. 329.

(*l*) Doe d. Barney v. Adams, 2 Cr. & J. 232; and see per Lord Lyndhurst, C. B., Smith v. Pocklington, 1 Cr. & J. 446.

(*m*) Treport's case, 6 Co. 15.

(*n*) Blake v. Foster, 8 T. R. 487; Stokes v. Russel, 3 T. R. 678; Co. Lit. 47, b.; per Alderson B., 6 M. & W. 662; Webb v. Austin, 8 Scott N. R., 419; Pargeter v. Harris, 15 L. J., N. S., Q. B., 113.

(*o*) Blake v. Foster, supra; Green v. James, 6 M. & W. 656; cited judgment, 15 L. J. N. S., Q. B., 117.

can sue upon the covenants in the lease is one respecting which there are conflicting authorities, and which, although much considered in several very recent cases, does not appear as yet to be quite satisfactorily settled. Where the mortgagor and mortgagee of a term jointly leased, and the covenants for payment of rent and for repairs were with the mortgagor and his assigns, it was held, that these covenants, being entered into with one who had no legal interest in the land did not run with it to the assignee of the mortgagee.(p) In Whitton v. Peacock,(q) which is *usually cited as an authority for answering the question above stated in the negative, but where the grounds on which the opinion of the court was founded were not stated, the facts were as follows:—A copyholder devised his estate to another without surrendering to the use of his will. The devisee of the devisee, who consequently had no estate at all, either legal or equitable, in the land, demised part of the copyhold by deed, and the lessee covenanted to pay rent and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who subsequently demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessee of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copyhold to another, and the question was, whether the surrenderee could maintain an action on the covenants against the assignee of the lessee; and the Court of Common Pleas held that no such action would lie.

[*38 a]

46 *b*. As before stated, no reason is given for this decision; but it was observed by Mr. Baron Parke, in the recent case of Gouldsworth v. Knights,(r) as a satisfactory one, that a reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance. The decision, however, in the case last cited, was in effect that a tenant who continues in possession after the determination of his lease, and pays *rent to his former landlord, is not merely estopped from disputing his landlord's title, but is also estopped from denying that he has a reversion which is capable of being assigned;(s) and this proposition appears irreconcilable with the decision in Whitton v. Peacock. Moreover, the subsequent case of Webb v. Austin(t) affirms the position laid down by Sir E. Coke and Lord Hale,(u) that where a person leases land, having no interest therein, and subsequently purchases the land, that which was at first a lease by estoppel only, is turned into a lease in interest; and, applying this rule to the facts in Whitton v. Peacock, it follows that the lease by the second devisee, which was in the first instance a lease by estoppel only, became by the surrender of the heir of the devisor a lease in interest on the covenants in which an action would lie by (or against(x)) the assignee of the lessor. And, in accordance with this view, where a termor, having

[*38 b]

(p) Webb v. Russell, 3 T. R. 393. 402. In Noke v. Awder (Cro. Eliz. 373, 436) it was held that the assignee of a lease by estoppel cannot sue on the covenants in the lease.

(q) 2 B. N. C. 411.[b]

(r) 11 M. & W. 337. 343;[♦] cited Pargeter v. Harris, 15 L. J., N. S., Q. B., 113. 117; Oxley v. James, 13 M. & W. 209.[♦]

(s) See the judgment, 8 Scott, N. R., 844.

(t) 8 Scott, N. R., 419.

(u) Co. Litt. 47, b.; Ibid. note (11).

(x) Sturgeon v. Wingfield, 15 L. J., N. S., Exch. 212.

[b] Eng. Com. Law Reps. 29. [♦] Re-printed at $2.50 per vol.

previously assigned the term by way of mortgage, made a sub-demise, and then surrendered the term, and subsequently took a re-demise, and then assigned the reversion in this last-mentioned term: it was held, that the lessee might sue the assignee of the reversion in covenant; for although the lease was originally a lease by estoppel only, the legal reversion being, at the time of its execution, vested in the mortgagees, yet it became a lease in interest by the *re-demise to the lessor, and the reversion being likewise by estoppel, was an estate in fee by wrong, which did not consequently pass by the surrender of the term, and was subsequently fed by the re-demise.(y) From an examination of the cases above cited, we may observe that it does not appear to have been decided that the assignee of a reversion by estoppel can sue in covenant on the lease; and perhaps the weight of authority may be thought to incline the other way; but only that he may do so where the lease by estoppel has become subsequently turned into a lease in interest. [*38 c]

47. If rent be assigned without the reversion, the assignee may sue in debt for any arrears accruing after such assignment, because the privity of contract is transferred;(z) though, if the lessor grant away his reversion, he cannot have an action of debt for the rent, because, being incident to the reversion it passes therewith.(a) But in this case, debt lies for the assignee of the reversion, against the lessee at common law; for the rent being, as just stated, incident to the reversion, and the lessee being in possession of the land, and in the perception of the profits, the law, therefore, creates such a privity between them as will support this action;(b) but this privity will be destroyed by assigning over.(c)

*48. It is extremely well settled at common law, without referring to the stat. 32 H. 8, c. 34, that covenants which run with the land will pass to the person to whom the land descends;(d) and for breach of such covenants, as of a covenant to repair, occurring after the ancestor's death, the heir may sue, though not expressly named as a covenantee;(e) and in such a case, if the premises became out of repair in the ancestor's lifetime, and so descended to the party suing, the damages are to be determined by the cost of repairing at the time of action brought, and not by the length of time during which they have been suffered to remain in decay.(f) In general, no doubt, the executor, and not the heir, is the proper party to sue for a breach of covenant committed during the lifetime of the lessor, and such an action may be maintained by him without an averment of special damage in the declaration;(g) yet it is to be observed, [*38 d]

(y) Sturgeon v. Wingfield, supra.
(z) Allen v. Bryan, 5 B. & C. 512,[c] and n. (b); Robins v. Cox, 1 Lev. 22.
(a) Woodfall, L. and T., 5th ed. 636; post, p. 31.
(b) Thursby v. Plant, 1 Wms. Saund. 238. 241, b, n. (6), and cases there cited.
(c) Humble v. Glover, Cro. Eliz. 328.
(d) Per Lord Kenyon, C. J., Webb v. Russell, 3 T. R. 401; Woodfall, L. & T., 4th ed. 192, 193.
(e) Lougher v. Williams, 2 Lev. 92; Sacheverell v. Froggatt, 2 Saund. 367; Chitt. Pl. 5th ed. 24, n. (b); Bac. Ab. Heir and Ancestor, (C.); Com. Dig. Covenant, (B. 2.) See Roe d. Bamford v. Hayley, 12 East, 464.
(f) Vivian v. Campion, 1 Salk. 141. M.
(g) Ricketts v. Weaver, 12 M. & W. 718,[♦] recognising Raymond v. Fitch, 2 Cr., & R. 588; post, n. (y).

[c] Eng. Com. Law Reps. 12. [♦] Reprinted at $2.50 per vol.

that where there are covenants real, that is, which run with the land, and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet, if the substantial damage has taken place since his death, *the real representative, and not the personal, is the proper plaintiff.(y)

[*39]

49. But except as above, the personal representative should sue for a breach of covenant committed in the lifetime of the lessor, because the damage resulting therefrom affects his personal estate; and this remark applies, whether the covenant be real or collateral; and for the breach of a covenant subsequently to the lessor's death, if such covenant be collateral, but not intended to be limited by the life of the covenantee, the personal representative alone can sue.(z) The executor's right to sue rests on privity of contract; so that where a lessee underleased for a term longer than his own, and the underlessee covenanted to pay rent to the lessee, it was held, that the executor of the latter might sue on such express covenant during the continuance of the testator's term, although not possessed of any reversion.(a)

50. Where the landlord, being tenant for life, happens to die before the day on which the rent is reserved or made payable, and the demise determines on his death, such rent is now(b) apportionable and *may be recovered by the personal representatives of the tenant for life, the heir or remainderman being entitled to such as accrues subsequently to the termination of the life estate; and by stat. 4 & 5 Will. 4, c. 22, s. 2, all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power subsequently to the passing of the act, are in like manner apportioned, though the entire rent must be recovered in the first instance from the tenant by the party who would, under the previously existing law, have been entitled to the same, such party being liable over at law, or in equity, to the representatives of the lessor. So rent may be apportioned between the heir and the executor, by operation of law, as if a man, seised in fee of one acre of land and possessed of another acre for a term of years, make a lease, rendering one entire rent, and dies, in this case the rent shall be divided between the real and personal representatives.(c)

[*40]

51. The stat. 32 Hen. 8, c. 34, s. 2, gives to the lessee and his assignees reciprocal remedies to those conferred on the lessor and the assignees of the reversion. But it seems that, at common law, covenants ran with the land, though not, as we have previously seen, with the reversion, so that the assignee of the lessee was held to be liable in covenant, and entitled to

(y) Per Lord Abinger, C. B., Raymond v. Fitch, 2 C. M. & R. 598, 599, and cases there cited; Bac. Ab. Heir and Ancestor, (C.); Kingdon v. Nottle, 4 M. & S. 53, post, s. 129.

(z) Bac. Ab. Executors and Administrators, (N.); Raymond v. Fitch, 2 C. M. & R. 588. 596 et seq., and the cases there collected; Kingdon v. Nottle, 1 M. & S. 355, and 4 M. & S. 53. An executor derives his right to sue in debt for arrears of rent under statute 32 Hen. 8, c. 37, s. 1; and see post, s. 129.

(a) Baker v. Gostling, 1 Bing. N. C. 19; see Wollaston v. Hakewill, 3 Scott, N. R. 593, cases there cited.

(b) Stat. 11 Geo. 2, c. 19, s. 15, extended by stat. 4 & 5 Will. 4, c. 22, to leases determinable on death of lessor, though not strictly tenant for life, or on the death of tenants pur autre vie.

(c) Moodie v. Garnance, 3 Bulst. 153.

bring covenant, but the assignee of the lessor was not.(*d*) Under the term "assignee," is comprehended the assignee of the assignee, *and of the executor or administrator of the assignee, the executor of the [*41] lessee's assigns and the executor of such executor, &c.(*e*) So, the executor of B., the executor of A., is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A.(*f*)

52. Where a lessee has assigned over his lease by deed executed prior to the operation of the recent statutes 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, the assignee, if distrained upon for rent, may, in the absence of any express covenant for quiet enjoyment, sue the assignor on the covenant implied in the word "grant" in the deed; but by the 4th section of the latter statute(*g*) it is enacted that the word "give" or "grant," in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any hereditament, except by force of any act of Parliament. A covenant for quiet enjoyment, however, is also implied by the word "demise" in a lease for years; and this implication is not taken away by either of the above-mentioned statutes.(*h*) Where a lease contained a clause that the lessor the said demised premises, "against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend:" it was held, that this clause amounted to an *express* covenant for quiet enjoyment on which an action could be maintained *by the assignee of the lessee against the executors of the lessor.(*i*) [*42]

53. An underlessee cannot sue on the covenants in the original lease, there being no privity of contract or estate between him and the reversioner.(*k*)

2.—Principal and Agent.

When the Principal should sue, and Exceptions to the Rule, ss. 54—56. Agent for the Sale of Goods, ss. 57—62. Auctioneer, ss. 63—65. Consignor, Consignee, and Carrier, ss. 66—68. Consignor, Consignee, and Shipowner, ss. 69—71. Other Exceptions to the general Rule, s. 72.

54. When a contract is entered into with A., as agent for B., it is in contemplation of law entered into with B., and, as a general rule, he alone can sue for a breach thereof;(*l*) it being a question of fact for the jury with

(*d*) Thursby v. Plant, 1 Wms. Saund. 240, n. (3); Smith's Leading Cases, Vol. I., note to Spencer's case.

(*e*) Spencer's case, 5 Co. 16, 7th Resolution; 2 Bla. Com. 506.

(*f*) Chapman v. Dalton, Plowd. 284.

(*g*) See 7 & 8 Vict. c. 76, s. 6, which takes effect from January 1, to October 1, 1845.

(*h*) See Adams v. Gibney, 6 Bing. 666;[d] Baber v. Harris, 9 A. & E. 532;[e] Stanley v. Hayes, 3 Q. B. 105;[f] Baker v. Greenhill, 3 Q. B. 140;[f] Spencer's case, 5 Co. 16, 5th Resolution.

(*i*) Williams v. Burrell, 1 C. B. 402; citing Andrew v. Pearce, 1 N. R. 158. See Messent v. Reynolds, 10 Jur. 550.

(*k*) Holford v. Hatch, 1 Dougl. 183; Stone v. Evans, cited, Woodf. L. & T. 4th ed. 602, post, s. 181.

(*l*) Broom's Legal Maxims, 373; Moores v. Hopper, 2 Bos. & Pul. N. R. 511. The sequestrator of a benefice appointed under a writ of *sequestrari facias* is the mere bailiff or agent of the bishop. Harding v. Hall, 10 M. & W. 42.

[d] Eng. Com. Law Rep. 19. [e] Id. 36. [f] Id. 43.

whom was the contract actually made, and evidence being of course admissible to shew that the contract declared upon was entered into with a third party as principal and not as agent for the plaintiff.(*m*)

[*43] *55. Where, however, A. is made nominally a party to a deed, though in reality as agent for B.,(*n*) or if such deed, though expressed to be between him as such agent and the other parties thereto, be in fact executed by A. in his own name,(*o*) he alone can sue thereon; and any payment good, as between the parties on the record, will be an answer to the action.(*p*) In order, moreover, for one party to execute a deed as agent for another, the party executing as agent must be authorized so to do by deed.(*q*)

56. On a maritime policy of insurance not under seal, either the broker causing the same to be made, and named therein,(*r*) or the party beneficially interested may sue.(*s*) A person, however, who has assigned away his interest in a ship after effecting a policy of insurance upon her, and before the loss, cannot sue upon the policy, unless there has been some understanding that the policy shall be kept alive by the vendor for the benefit of the purchaser, or unless the policy has been handed over upon

[*44] the assignment to the purchaser, in *either of which cases the vendor may sue upon the policy as trustee for the purchaser.(*t*)

57. Where an agent for the sale of goods contracts in his own name and as a principal, the general rule is, that the action may be supported either in the name of the party by whom the contract was made and privy to it, or of the party on whose behalf and for whose benefit it was made;(*u*) the former suing in respect of his privity, and the latter in respect of his interest.(*x*) And where parties contract with a known agent or factor entrusted with goods for the purchase of such goods, even with notice of his being such agent, and pay for the same, in pursuance of the contract, such contract and payment shall be binding upon and good against the real owner, if made in the ordinary course of business, and without notice that the agent is not authorized to sell;(*y*) and the like protection has likewise been extended

(*m*) See Brunton v. Thompson, Q. B., Law Times, vol. vii. p. 430. Gordon v. Ellis, 15 L. J., N. S., C. P., 178, where the question was as to the ownership of goods sold by auction. (*n*) Shack v. Anthony, 1 M. & S. 573.

(*o*) Berkeley v. Hardy, 5 B. & C. 355;[g] but see ss. 3, 4.

(*p*) Gibson v. Winter, 5 B. & Ad. 96.[h]

(*q*) See the cases in Smith's Merc. Law, 2nd ed. 79, n. (*l*); Harrison v. Jackson, 7 T. R. 207. 210; Wilks v. Back, 2 East, 142.

(*r*) Statute 28 Geo. 3, c. 56, per Buller, J., Woolff v. Horncastle, 1 B. & P. 320; Usparicha v. Noble, 13 East, 332; Cumming v. Forester, 1 M. & S. 494; Hagedorn v. Oliverson, 2 M. & S. 485.

(*s*) Per Bayley, J., Garrett v. Handley, 4 B. & C. 666;[i] and in Sargent v. Morris, 3 B. & Ald. 281;[k] Mellish v. Bell, 15 East, 4; Bell v. Gibson, 1 B. & P. 345; Sutherland v. Pratt, 12 M. & W. 16. (*t*) Powles v. Innes, 11 M. & W. 10.

(*u*) Per Bayley, J., Sargent v. Morris, 3 B. & Ald. 280;[l] Sims v. Bond, 5 B. & Ad. 393;[m] Gordon v. Ellis, 15 L. J., N. S., C. P. 178; Duke of Norfolk v. Worthy, 1 Camp. 337; Cothay v. Fennell, 10 B. & C. 672;[n] Bastable v. Poole, 1 Cr. M. & R. 413; per Lord Abinger, C. B., Sykes v. Giles, 5 M. & W. 650;[o] Garrett v. Handley, 4 B. & C. 656;[p] Humphrey v. Lucas, 2 Car. & K. 152.[p]

(*x*) Per Lord Abinger, C. B., 5 M. & W. 650.[o] (*y*) 6 Geo. 4, c. 94, ss. 2. 4.

[g] Eng. C. L. R. 11. [h] Id. 27. [i] Id. 10. [k] Id. 5. [l] Id. 5. [m] Id. 27. [n] Id. 21. [o] Id. 10. [p] Id.

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to bonâ fide advances upon goods and merchandize in the hands of an agent made under similar circumstances.(z)

58. It must be observed, however, that the right of suit vested in the agent is subject to the right of interference of the undisclosed principal, although such right will not be affected by a subsequent repudiation of the contract on the part of the latter;(d) and, further, if the defendant has accredited and acquired a set-off against the agent before the principal interposed, justice requires that the latter should be bound by the set-off in the same way that the agent would have been had he been the plaintiff on the record;(e) and that the defendant should be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.(g) This right of set-off, however, could not be maintained, if the purchaser had either express notice, or the means of knowing, that the vendor was a mere agent in effecting the sale, before the completion of the contract.(h) [*45]

59. But the doctrine just considered seems not to apply where the agent is a mere broker, not having the possession, or being entrusted with, the goods; for, if he sell goods without disclosing the name of his principal, he acts beyond the scope of his authority;(i) and it is laid down, that a broker, with an undisclosed principal, may vary the terms of sale after the sale is completed, and the principal may interfere at any time before payment;(k) but not to rescind what has been before done. But, if a man sell goods, acting as a broker, the moment the sale is completed he is functus officio, and the terms of the contract cannot then be altered, except by the authority of the principal.(l) [*46]

60. In like manner, where the agent is a factor receiving a del credere commission, the principal may, at any period after the contract of sale has been concluded, demand payment of the sum agreed on to himself, unless such payment had previously been made to the factor in due course, and according to the terms of the contract; for a del credere commission is in the nature of a private agreement between factor and principal, by virtue of which the latter obtains an additional security, while his right of suing the vendee is not affected.(m)

61. Further, there are cases in which an agent, professing himself to contract as such, may maintain an action in his own name; as, if he have

(z) 5 & 6 Vict. c. 39, ss. 1. 3; Hatfield v. Phillips, 12 Cl. & Fin. 343.

(d) Short v. Spackman, 2 B. & B. 962. See Langstroth v. Toulmin, 3 Stark. N. P. C. 145.

(e) George v. Clagett, 7 T. R. 359; Carr v. Hinchliff, 4 B. & C. 547; Taylor v. Kymer, 3 B. & Ad. 334; Warner v. M'Kay, 1 M. & W. 591.

(g) Judgment in Sims v. Bond, 5 B. & A. 393, and in Bonzi v. Stewart, 11 Law. Journ., N. P., C. P. 235. See Bastable v. Poole, 1 Cr. M. & R. 410. 413.

(h) Moore v. Clementson, 2 Camp. 22; Maans v. Henderson, 1 East, 335; Estcott v. Milward, cited, 7 T. R. 361; Warner v. M'Kay, 1 M. & W. 591.

(i) Baring v. Corrie, 2 B. & Ald. 137; 2 Selw. N. P. 10th ed. 815.

(k) Payment to the agent is a good defence as against his principal, if the former sell as owner, by permission of the latter. Coates v. Lewis, 1 Camp. 444.

(l) Per Lord Ellenborough, C. J., Blackburn v. Scholes, 2 Camp. 343, 344.

(m) Hornby v. Lacy, 6 M. & S. 172; Morris v. Cleasby, 4 M. & S. 566. 574; Sadler v. Leigh, 4 Camp. 195; Grove v. Dubois, 1 T. R. 112; Scrimshire v. Alderton, 2 Stra. 1182.

transferred the property of his principal, under circumstances which give a [*47] right to recover it back;(n) or, in the instance *of a factor who has a lien for his balance on the price of goods sold by him;(o) in the former case, the principal likewise being entitled to recover the money in his own name,(p) and, in the latter, to enforce payment to himself in the absence of notice from the broker.(q) But, if the principal repudiates the contract of the agent on his behalf, the latter may recover in his own name money paid by him after notice of such repudiation, and which he is entitled to recover under the conditions of the sale.(r)

62. Where the principal contracts in the character of agent for another party, he cannot sue without first giving notice of his real character and interest.(s)

63. An auctioneer is entitled to sue for the price of goods sold by him in the course of his business, because he is not only privy to the contract of sale but has a special property in the subject-matter of it;(t) if, however, his employer is proved not to be the real owner, by whom notice is given, this constitutes a good defence, for the right of such latter party intervenes.(u) Nor can an auctioneer, having sold A.'s goods by mis- [*48] take, as those of B., who is paid by the purchaser, recover the price on behalf of the real owner:(x) and, where goods belonging partly to A. and partly to B. were sold by the auctioneer as the sole property of A., a purchaser and creditor of the latter was held entitled to set off, in an action brought by the auctioneer, the debt due from A. against the price of the goods belonging to B.(y)

64. Payment to the auctioneer will be good, if made according to the conditions of sale, but not otherwise, unless he be the general agent of the vendor; and, therefore, where the conditions stipulated for payment in cash to the vendor's agent, it was held that payment by a bill to the auctioneer, who subsequently became bankrupt, and which bill was duly honoured at maturity, would not protect the vendee in an action at suit of the vendor to recover the amount.(z)

65. Where the plaintiffs let lands by auction under certain conditions of sale, whereby it did not appear that the tenant was to hold them as landlords, and he in fact knew that another party was the real owner; it was decided that they could not maintain an action for use and occupation against

(n) Per Lord Mansfield, C. J., Stevenson v. Mortimer, 2 Cowp. 806.
(o) Drinkwater v. Goodwin, 1 Cowp. 251. 256, recognised in Hudson v. Granger, 5 B. & Ald. 27. 33;[u] Atkyns v. Amber, 2 Esp. 493.
(p) Duke of Norfolk v. Worthy, 1 Camp. 337; Stevenson v. Mortimer, 2 Cowp. 805; Bethune v. Farebrother, cited 5 M. & S. 385; Challand v. Bray, 11 Law Journ., N. S., Q. B. 204.
(q) Drinkwater v. Goodwin, 1 Cowp. 255.
(r) Langstroth v. Toulmin, 3 Stark. N. P. C. 145.[x]
(s) Bickerton v. Burrell, 5 M. & S. 383.
(t) Williams v. Millington, 1 H. Bla. 81; noticed per Park, J., 7 Taunt. 241.
(u) Dickson v. Naul, 4 B. & Ad. 638,[y] and cases there cited.
(x) Coppin v. Walker, 7 Taunt. 237.[z]
(y) Coppin v. Craig, 7 Taunt. 243;[z] Coppin v. Walker, 7 Taunt. 237.[z]
(z) Sykes v. Giles, 5 M. & W. 645.

[u]Eng. Com. Law Rep. 7. [x]Id. 14. [y]Id. 24. [z]Id. 2.

the tenant;(*a*) and the principle of this decision holds whenever lands are let by a mere agent.(*b*)

66. Where goods are consigned by A. to B., the *former is considered in law as the agent of the latter, for the purpose of contracting for the carriage; and therefore B., the consignee, must in general sue the party taking charge of the goods, and responsible for their safe delivery; and the reason of this is, that the delivery to the carrier is in law a delivery to B., in whom the property thereupon becomes impliedly vested (subject to the vendor's right of stoppage in transitu), except under special circumstances.(*c*) It must, however, be remembered that acceptance by the carrier is not an acceptance by the consignee.(*d*) [*49]

67. The above rule obtains in cases where the carrier is to be paid by the vendor and consignor (who is at law liable for the carriage) (*e*), the property being in the vendee.(*f*) But where a bill of lading stated that the goods were shipped, and their freight paid by the consignor, it was held to establish a privity of contract between the consignor and shipowner, which would entitle the former to recover against the latter for non-delivery of the goods—the damages so recovered being held by the plaintiff in trust for the consignee;(*g*) and so, if there be a special agreement between the consignor and carrier, although payment of carriage or for booking the goods by the former would not be evidence of such *agreement;(*h*) and where the goods are stated in the bill of lading to be shipped by order and on account of the consignor, and the freight is not paid by the shipper, it is clear that the former only is entitled to sue, for the law recognizes the property as recognized by the bill of lading;(*i*) and this is equally true if the goods were ordered by the consignee on an insurance being effected, and on the terms of three months' credit from the time of arrival, such arrival not constituting a condition precedent to the payment.(*k*) [*50]

68. We have seen that the reason why the consignee must in general sue the carrier in respect of goods delivered to him is, that the property therein vests by such delivery; but delivery to the carrier cannot be held to be a delivery to the consignee, unless the latter party has expressly directed the sending of the goods by some particular conveyance, or at least

(*a*) Evans v. Evans, 3 A. & E. 132.[b]

(*b*) Pigott v. Thompson, 3 B. & P. 147; Bowen v. Morris, 2 Taunt. 374; Israel v. Simmons, 2 Stark. R. 356.[c]

(*c*) Dawes v. Peck, 8 T. R. 330; Brown v. Hodgson, 2 Camp. 36; Per Lord Ellenborough, C. J., Griffin v. Langfield, 3 Camp. 254; Fragano v. Long, 4 B. & C. 219.[d]

(*d*) Per Parke, B., Johnson v. Dodgson, 2 M. & W. 656.

(*e*) Moore v. Wilson, 1 T. R. 659; Coleman v. Lambert, 5 M. & W. 502; see Domett v. Beckford, 5 B. & Ad. 524, 525.[e]

(*f*) Per Lawrence, J., in King v. Meredith, 2 Camp. 639: and Dawes v. Peck, 8 T. R. 334.

(*g*) Joseph v. Knox, 3 Camp. 320.

(*h*) Davis v. James, 5 Burr. 2680; Dawes v. Peck, 8 T. R. 333, 334; Per Gaslee, J., Stephenson v. Hart, 4 Bing. 487.[f] In Moore v. Wilson, 1 T. R. 659, such a contract must have been proved; see per Lord Denman, C. J., Gilbart v. Dale, 5 A. & E. 546;[g] Jacobs v. Nelson, 3 Taunt. 423, supra, n. (*f*).

(*i*) Brown v. Hodgson, 2 Camp. 36; 3 Id. 322, n. (*a*).

(*k*) Fragano v. Long, 4 B. & C. 219.[h]

[a]Eng. Com. Law Reps. 30. [b]Id. 3. [c]Id. 10. [d]Id. 27. [e]Id. 33. [f]Id. 31. [g]Id. 10.

the sending by some conveyance or other.(*l*) So, where a special property remains in the consignor as bailee;(*m*) or the general property is not to pass until performance of some condition by the consignee, which is not performed by him;(*n*) or if goods be sent for approval;(*o*) or the [*51] *transaction be bottomed in fraud, so that there was no valid sale or transfer of property as between consignor and consignee;(*p*) in all these cases the former has the right of suit and not the latter.

69. The terms of the bill of lading will in general determine who is the proper party to sue the shipowner or carrier; the general rule being that the party to whom the goods are by that instrument appropriated should be plaintiff, so that, where the consignment by bill of lading is to A. for the use of B., the latter should sue;(*q*) but, if the bill of lading express that the goods are to be delivered to the consignee for the consignor, and in his name, (the consignee having no property in them at the time of shipment), the consignor is the proper party to sue;(*r*) and it must be observed, that there is nothing final and irrevocable in the nature of a bill of lading.(*s*) So that where the consignor, under such circumstances, indorses over and delivers the bill of lading, the indorsee thereupon acquires a property in the goods as against the consignee;(*t*) and a power to *transfer such [*52] property to a bonâ fide purchaser for a valuable consideration; though, as between the consignor and consignee the question, whether the property passed will depend upon what the real contract was;(*u*) and even where the right of property does pass by the indorsement, the *contract* is not transferred so as to enable the indorsee to sue upon the bill of lading in his own name.(*x*)

70. Where the agent of the shipowner, instead of a bill of lading, gave a receipt stating the goods to be received from the consignor for the consignee, it was held that the shipowner, having given his consent to treat the goods in his hands as the property of a particular party, was estopped from disputing that party's property in them;(*y*) but, in such a case, no appropriation can be complete so as to vest the property in the consignee, when the articles referred to are not on board the vessel in which they are intended to be consigned.(*z*)

(*l*) Coats v. Chaplin, 3 Q. B. 483;[l] Dutton v. Solomonson, 3 B. & P. 582; Hart v. Sattley, 3 Camp. 528.

(*m*) Freeman v. Birch, 1 Nev. & Man. 420.[k] (*n*) Brandt v. Bowlby, 2 B. & Ad. 932.[j]

(*o*) Swain v. Shepherd, 1 Moo. & Rob. 223.

(*p*) Per Park, J., Duff v. Budd, 3 B. & B. 183;[m] but see Stephenson v. Hart, 4 Bing. 476.[n] In both these cases the declarations were framed in case for the negligence, and not in assumpsit for the breach of contract.

(*q*) Per Best, J., Sargent v. Morris, 3 B. & Ald. 282;[o] Evans v. Marlett, 1 Lord Raymond, 271.

(*r*) Sargent v. Morris, 3 B. & Ald. 277;[o] and see Coxe v. Harden, 4 East, 211.

(*s*) Haille v. Smith, 1 B. & P. 563; Walley v. Montgomery, 3 East, 585; Coxe v. Harden, 4 East, 211; Ogle v. Atkinson, 5 Taunt. 759.[p]

(*t*) Mitchell v. Ede, 11 A. & E. 888. 903;[q] Bruce v. Wait, 3 M. & W. 15. See Barrow v. Coles, 3 Camp. 92.

(*u*) Judgment, Jenkyns v. Usborne, 8 Scott, N. R. 521.

(*x*) Thompson v. Dominy, 14 M. & W. 403; Sanders v. Vanzeller, 4 Q. B. 260.[r]

(*y*) Evans v. Nichol, 4 Scott, N. R. 43.

(*z*) Bryans v. Nix, 4 M. & W. 775; cited per Tindal, C. J., 4 Scott, N. R. 52.

[l]Eng. Com. Law Reps. 43. [k]Id. 28. [j]Id. 22. [m]Id. 7. [n]Id. 13. [o]Id. 5. [p]Id. 1. [q]Id. 39. [r]Id. 45.

71. If on the face of a charter-party under seal the master appears as owner, the remedy on such instrument must be in his name, though not if he be expressed to be and execute as an agent merely.(*a*) Where a charter-party, not under seal, entered into with the captain of a vessel, contained a clause similar to that in ordinary bills of lading, for payment of freight generally, and *without specifying to whom; it was held that the captain could not recover the amount thereof after demand by and payment to the owner.(*b*) But although the principal has in such cases always a right to interfere, the agent may, if this right be not exercised, sue in his own name on the bill of lading, or on the implied assumpsit to pay freight; and recovery in such action will bar the owner.(*c*). But the latter alone can sue on the contract implied by law for payment of demurrage, in the absence of any express stipulation relating thereto;(*d*) and in order to give this right of action to the master, a special clause for such purpose must be inserted in the bill of lading.(*e*) The mortgagor and not the mortgagee of a ship is to be deemed the owner:(*g*) whilst the mortgagee has a distinct interest from the mortgagor to the extent primâ facie of the value mortgaged;(*h*) but it has been held that accruing freight nevertheless passes to the mortgagee, who takes possession before the conclusion of the voyage.(*i*) [*53]

72. Lastly, exceptions to the general rule that the principal and not the mere agent should sue on a *contract, occur under the express provisions of different statutes; by which commissioners of roads, corporate bodies and companies chartered or otherwise,(*k*) are empowered to sue and may be sued by their secretary, clerk or clerks for the time being, or by one of the directors named in the deed of settlement; but this power is limited to such contracts as they are authorized to make; and the clerk, or other party empowered to sue, cannot, in such a case, resort to his public capacity to recover for work done by him in his private capacity.(*l*) [*54]

(*a*) Ante, s. 55; Horsley v. Rush, cited 7 T. R. 209.
(*b*) Atkinson v. Colesworth, 3 B. & C. 647;[s] Smith v. Plummer, 1 B. & Ald. 575.
(*c*) Atkinson v. Colesworth, 3 B. & C. 649;[s] Shields v. Davis, 6 Taunt. 65;[t] Chitt. Jun. Plead. 93, n. (*n*).
(*d*) Evans v. Foster, 1 B. & Ad. 118;[u] Brouncker v. Scott, 4 Taunt. 1.
(*e*) Jesson v. Solly, 4 Taunt. 52.
(*g*) Stat. 6 Geo. 4, c. 110, s. 45.
(*h*) Per Parke, J., Irving v. Richardson, 2 B. & Ad. 196. See per Best, C. J., Dean v. M'Ghie, 4 Bing. 45.[x]
(*i*) Dean v. M'Ghie, 4 Bing. 45;[x] Kerswill v. Bishop, 2 Cr. & J. 529, and cases there cited; Chinnery v. Blackburne, 1 H. Bla. 117, n.
(*k*) Stat. 3 Geo. 4, c. 126, s. 74. See Stat. 5 & 6 Will. 4, c. 69, s. 7; Per Bayley, J., Guthrie v. Fisk, 3 B. & C. 183;[y] Goody v. Penny, 11 Law Journ., N. S., Exch. 289; Skinner v. Lambert, Id. C. P. 237. See Timms v. Williams, 11 Law Journ., N. S., Q. B. 210.
(*l*) Curling v. Johnson, 10 Bing. 89.[z]

[s]Eng. Com. Law Reps. 10. [t]Id. 1 [u]Id. 20. [x]Id. 13. [y]Id. 10. [z]Id. 25.

3.—Partners—Corporations—Companies.

General Rule as between the Parties themselves, s. 73. Exceptions to the above rule, ss. 74—78. When the same Person is a Partner in several Firms, s. 79. Rule as to the Joinder of Partners in suing a Stranger to the Firm, ss. 80—82. When the Directors or Trustees of a Company may sue, s. 83. Whether a nominal or a dormant Partner should be joined, ss. 84, 85. Who should sue after a change in the Firm, ss. 86, 87. As between a corporate Body and a Member thereof, ss. 88, 89. As between a corporate Body and a Stranger, ss. 90, 91. How chartered and banking Companies may sue, ss. 92, 93.

73. First, as between themselves:—The general rule is, that between partners, whether they are so in general or for a particular transaction only, [*55] no account can be *taken at law;(m) and therefore a partner cannot maintain an action against his copartner for goods sold,(n) work done,(o) for money had and received in connexion with a partnership transaction,(p) or for contribution towards a payment made under compulsion of law;(q) and this disability exists, provided the party seeking redress be the real though not the nominal or ostensible partner;(r) but the partnership must be actually formed and set agoing.(s) In accordance with the above, it has been held, that an attorney, who had been member of a dissolved company and employed subsequently to its dissolution, in defending actions brought against other members, could not recover from the latter his costs and charges so incurred, being himself liable to contribute thereto:(t) nor can a shareholder in a company recover on bills drawn by him on and accepted for the directors, for this is the case of one partner drawing on the [*56] partnership concern, including himself;(u) but if *a partner were to draw on other partners by name, and they were individually to accept, he might recover against them, because, by such an acceptance, a separate right is acknowledged to exist.(x)

74. The first exception to the above rule arises where there is an express covenant or special agreement between partners, independent of the partnership accounts:(y) as, where plaintiff and defendants being members of a

(m) Per Abbott, C. J., Bovill v. Hammond, 6 B. & C. 151,[a] and infra. As to what does or does not constitute a partnership between the parties themselves, see the cases collected, Chitt. Cont. 3rd ed. 231 et seq.; Elgie v. Webster, 5 M. & W. 518.[♦]

(n) Harvey v. Kay, 9 B. & C. 356.[b]

(o) Holmes v. Higgins, 1 B. & C. 74;[c] Milburn v. Codd, 7 B. & C. 419.[d]

(p) Bovill v. Hammond, 6 B. & C. 149.[e]

(q) Saddler v. Nixon, 5 B. & Ad. 936;[f] Pearson v. Skelton, 1 M. & W. 504.[♦]

(r) Goddard v. Hodges, 1 Cr. & M. 33.

(s) Nockells v. Crosby, 3 B. & C. 814;[g] Gale v. Leckie, 2 Stark. N. P. C. 107;[h] Fox v. Frith, 11 Law Journ., N. S., Exch. 336.

(t) Milburn v. Codd, 7 B. & C. 419.[i]

(u) Neale v. Turton, 4 Bing. 151;[k] Teague v. Hubbard, 8 B. & C. 345.[l]

(x) Per Best, C. J., Neale v. Turton, 4 Bing. 151;[m] Collyer, on Partnership, 147; Fox v. Frith, 11 Law Journ., N. S., Exch. 336.

(y) Per Parke, B., Brown v. Tapscott, 6 M. & W. 123;[♦] Per cur., Thimblethorpe v. Hardesty, 7 Mod. 116. See a form in Covenant, Partner v. Copartner, Chitt. Jun. Pleading, 480, and n. (c).

[a]Eng. Com. Law Reps. 13. [b]Id. 17. [c]Id. 8. [d]Id. 14. [e]Id. 13. [f]Id. 27. [g]Id. 10. [h]Id. 3. [i]Id. 14. [k]Id. 13. [l]Id. 15. [m]Id. 13. [♦]Reprinted at $2.50 per vol.

joint-stock company, plaintiff agreed to demise land to defendants as trustees for the company, defendants covenanting to pay rent, and by a separate deed plaintiff and the other members of the company covenanted to indemnify defendants for acts done by them as trustees; it was held that plaintiff might sue defendants on their covenants, for the damages so recoverable were not in the first instance to be borne out of the common fund in which plaintiff was interested, but by the defendants, who were at some future and uncertain period to be indemnified in such manner as the society should direct.(z) In like manner if partners by the deed of partnership, covenanted to advance each a certain sum at first,(a) or if by deed on dissolving partnership an express covenant not relating to the partnership accounts is entered into,(b) *the covenantee may sue for breach of such covenant; and so he may for [*57] breach of a covenant to account.(c) But where a partner in a house of trade, being indebted to the partnership on his individual account, covenanted with himself and the other partners for repayment of the debt; such debt could not, it was held, be pleaded as a specialty debt, or by way of retainer in an action against his executors, two of whom were partners in the firm; nor could the testator himself, while living, have been sued on this deed in a court of law, or his executor after his decease, though strangers to the firm.(d)

75. In the cases just considered, the claim was founded on an express covenant or agreement; but a state of circumstances may exist, in which a debt, arising out of partnership transactions, may be due to and recoverable by one partner from his co-partner:(e) thus money, wrongfully carried to the partnership account, may be recovered by the partner to whom it is due;(g) and if a final balance be struck between partners, whether they are so generally or for one particular adventure, and whether the balance be ascertained by the parties themselves, or through the medium of the court or of an arbitrator,(h) an action lies for such balance by the party *entitled to it, nor in such a case is an express promise necessary, [*58] if the account stated was meant to be a final account;(i) and this exception extends to the case where such balances are struck monthly but kept distinct from each other and not carried forwards, so as to form a running

(z) Bedford v. Brutton, 1 Bing. N. C. 399;[n] Andrews v. Ellison, 6 Moore, 199.
(a) Venning v. Leckie, 13 East, 8; Per Lord Ellenborough, C. J.
(b) Want v. Reece, 1 Bing. 18.[o]
(c) Per Buller, J., Foster v. Allanson, 2 T. R. 482.
(d) De Tastet v. Shaw, 1 B. & Ald. 664. 669.
(e) Per Lord Abinger, C. B., Worrall v. Grayson, 1 M. & W. 168.*
(g) Smith v. Barrow, 2 T. R. 476.
(h) Foster v. Allanson, 2 T. R. 479; Moraira v. Levi, Id. 483, n. (a); Winter v. White, 1 B. & B. 350;[p] Wray v. Milestone, 5 M. & W. 21;* Smith v. Barrow, 2 T. R. 476; Fromont v. Coupland, 2 Bing. 170;[q] and an action lies on the decree of a colonial court for payment of a balance on partnership accounts: Henley v. Soper, 8 B. & C. 16.[r]
(i) Wray v. Milestone, 5 M. & W. 21;* Collyer v. Partnership, p. 153, 154; Rackstraw v. Imber, 2 Holt, N. P. C. 368; but see Fromont v. Coupland, 2 Bing. 172;[s] Foster v. Allanson, 2 T. R. 479; Cited Green v. Beesley, 2 Bing. N. C. 113.[t]

[n]Eng. Com. Law Reps. 27. [o]Id. 8. [p]Id. 5. [q]Id. 9. [r]Id. 15. [s]Id. 9. [t]Id. 29.
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account.(k) So, where A. and B. entered into partnership to work a coal-mine, and the mine being worked out they agreed to divide the partnership stock of materials and utensils, each party taking one half according to a valuation to be made, and after such valuation had been made, B. agreed to take the whole pursuant to that estimate, and accordingly entered into possession; it was held that A. had an immediate right of action for a moiety of the value of the partnership stock.(l)

76. In the case just referred to,(m) we find the following remarks by the court, in connexion with the present subject. "Upon the general rule of law there is no difficulty; one partner cannot maintain an action for a balance on the partnership account, until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made. But there may be special bar-
[*59] gains, by which particular transactions are *insulated and separated from the winding up of the concern, and are taken out of the general law of partnership.(n) In a recent case, however, it was observed that Fromont v. Coupland,(o) and other similar cases seem to limit the right of action on an account between partners to a settlement of accounts on a final close of all partnership transactions; but that, at all events, the settlement must be one which is binding and conclusive upon the partners.(p)

77. Where A. promised to repay his co-partner B., out of the amount of goods then sold, provided the latter would accept and pay certain bills for the firm, it was held that, on payment of such bills by B., the fund in A.'s hands, being specific and ascertained, became separated from the partnership account.(q) Where there were two partners in a certain voyage, one of whom agreed to pay the broker's commission on receiving a larger share of the profits, and after the partnership accounts were settled and adjusted he neglected so to do; an action to recover the amount of commission, paid by the other partner, was held to be maintainable.(r) So, also, if a sum of money be awarded to be paid by two partners jointly in equal moieties to a third party, one partner paying the whole amount may recover against his
[*60] *copartner;(s) and an action may be maintained by a shareholder against the company of which he is a member, on a contract entered into prior to his becoming so.(u)

78. It has been held that, although partners cannot, by a private arrangement amongst themselves, relieve any one member of their body from liability *quoad* the public, yet several partners in an undertaking may

(k) Brierley v. Crippe, 7 C. & P. 709.[a]
(l) Jackson v. Stopherd, 2 Cr. & M. 361. (m) Id.
(n) See Sharp v. Warren, 6 Price, 132; Chadwick v. Clarke, 1 C. B. 700; Rawlinson v. Clarke, 15 L. J., N. S., Exch. 171.
(o) Supra (i). See Garbett v. Veale, 5 Q. B. 409.
(p) Carr v. Smith, 5 Q. B. 138. See Sharpe v. Cummings, 14 L. J., N. S., Q. B. 10. See 8 & 9 Vict. c. 95, ss. 65. 68; under this Act a partner may sue his copartner.
(q) Coffee v. Brian, 3 Bing. 54:[c] Robson v. Curtis, 1 Stark. 78.[d]
(r) Wilson v. Cutting, 10 Bing. 436.[e]
(s) Burnell v. Minot, 4 Moore, 340; Sharpe v. Cummings, 14 L. J., N. S., Q. B. 10; Hutton v. Eyre, 6 Taunt. 289;[f] Wright v. Hunter, 1 East, 20; Osborne v. Harper, 5 East, 225.
(u) Lucas v. Beach, 1 Scott, N. R. 350.

[a] Eng. Com. Law Reps. 32. [c] Id. 11. [d] Id. 2. [e] Id. 25. [f] Id. 1.

agree with a copartner that he shall cease to hold that character, and shall assume another, and may by such an agreement, as evidenced by their own acts and conduct, estop themselves from subsequently setting up the partnership as existing *inter esse*.(*x*)

79. It follows from the general rule above laid down, that one firm cannot maintain an action against another firm if the same person is a partner in both houses, provided the right of action accrued during the period of his being such partner; nor does the death of the last-mentioned party remove this objection, though, after his decease, the surviving partners of one firm may sue those of the other on transactions subsequent thereto.(*y*)

*80. Secondly, as between partners and strangers to the firm. In suing strangers to the firm on a partnership transaction all the [*61] partners must join, for they are jointly interested;(*z*) but subsequently admitted partners should not be joined, even though under an agreement to share in profit and loss from a period antecedent to the contract.(*a*) The proper test for determining whether any particular transaction was on behalf of the partnership, is, whether the amount to be recovered would go, in the first instance, to the partnership fund.(*b*)

81. So, that where a guarantee was given and addressed to one member of a firm, but it was proved that the advance was made out of the partnership fund, it was held that the firm and not the individual member ought to sue;(*c*) though, on a covenant in a deed signed by one partner in the name of the firm and sealed with his seal, the partner executing alone can sue:(*d*) but if an application for a loan be made generally to a partner in a bank, the borrower thereby entitles the party so applied to, on making the advance, to hold him answerable to such party in either of his capacities of a partner or of a *private individual, according to that in which he [*62] makes the advance.(*e*) Where, however, the loan is made by one member of a firm and nominally in his individual capacity, the surviving partners, after his decease, cannot sue for the amount of such loan, unless they distinctly prove that it was in reality intended to be made on the partnership account;(*g*) nor can surviving partners sue the agent of a deceased partner for money really belonging to the partnership, but entered

(*x*) Day v. Sharp, Law Times, vol. vii. p. 62. See Radenhurst v. Bates, 3 Bing. 463. 470;[b] Davies v. Hawkins, 3 M. & S. 488. 491.

(*y*) Bosanquet v. Wray, 6 Taunt. 597;[c] Mainwaring v. Newman, 2 B. & P. 120; Rose v. Poulton, 2 B. & Ad. 822.[d] See Bosanquet v. Woodford, 5 Q. B. 310. Reference may also be made to Jacaud v. French, 12 East, 317; Sparrow v. Chisman, 9 B. & C. 241;[e] Jones v. Yates, 9 B. & C. 532.[e]

(*z*) Ante, s. 20. For the rule in equity, see Story's Eq. Pl. ss. 167, 168. As to what constitutes a partnership with reference to strangers, see the cases Chitt. Contr. 3d ed. 240 et seq.

(*a*) Wilsford v. Wood, 1 Esp. 183.

(*b*) Bond v. Pittard, 3 M. & W. 357; Pearson v. Skelton, 1 M. & W. 504; Thacker v. Shepherd, 2 Chitt. R. 652.

(*c*) Garrett v. Handley, 3 B. & C. 462;[f] and 4 B. & C. 664;[f] Walton v. Dodson, 3 C. & P. 162;[g] and see Moller v. Lambert, 2 Camp. 548.

(*d*) Metcalfe v. Rycroft, 6 M. & S. 75; ante, s. 55.

(*e*) Per Bayley, B., Alexander v. Barker, 2 Cr. & J. 138.

(*g*) Per Denman, C. J., Sims v. Bond, 5 B. & Ad. 393.[h]

[b] Eng. Com. Law Reps. 13. [c] Id. 1. [d] Id. 22. [e] Id. 17. [f] Id. 10. [g] Id. 14. [h] Id. 27.

by such agent in his separate account with the deceased partner, for there is no privity between the parties.(*h*) Where a partner contracts apparently on his own account, but really on account of the firm, either he may sue alone or the firm may sue on the contract made by him as their agent,(*i*) unless such partner was clearly dealt with in his individual capacity,(*k*) or unless he expressly declared the subject-matter of the contract to be his sole property;(*l*) and generally, whether, under given circumstances, an advance of money was made by the individual or by the partnership, is a question for the jury to decide.(*m*)

82. Again, cases may occur in which an action is maintainable by an individual partner, though arising out of partnership concerns, on the ground that he alone is interested therein: thus, where accountants were [*63] *employed to make out partnership accounts, and likewise the separate balance of each partner, it was held, that one partner who sustained loss by the inaccuracy of his separate account and balance, might sue alone for compensation, for there was a contract between the defendants and each of the partners, as well as a contract between the defendants and all.(*n*)

83. The directors of a company established by deed of settlement, derive the power of contracting for the company and of suing on contracts so entered into, from the express provisions of the deed; and where this power is vested in all the directors, they must sue jointly, unless the company be empowered to sue in the name of any one director, by statute;(*o*) and this holds notwithstanding the bankruptcy of one director, unless such office was thereby determined; though, whether the contract was made with themselves as directors, or with the company, will be determined by the particular circumstances under which it was concluded.(*p*) Therefore, a bond given to the trustees of an insurance company, conditioned for the faithful services of a clerk to the company, may be put in suit by them;(*q*) and such trustees are the proper plaintiffs in an action for the recovery of [*64] money paid under a policy of insurance *executed by them, but void on account of fraud, such payment having been made out of moneys deposited at the bankers of the company in the names of the trustees.(*r*)

84. Where a partner is only nominally such, he need not be joined in suing on a contract to which he was a stranger;(*s*) but it is necessary to show distinctly that he had no interest either in the partnership or in the

(*h*) Sims v. Brittain, 4 B. & Ad. 375.[l]
(*i*) Ante, s. 57; Arden v. Tucker, 4 B. & Ad. 815;[j] Skinner v. Stocks, 4 B. & Ald. 437;[k] Bawden v. Howell, 4 Scott, N. R. 331.
(*k*) Brandon v. Hubbard, 2 B. & B. 11.[l]
(*l*) Lucas v. De La Cour, 1 M. & S. 249. (*m*) Boswell v. Smith, 6 C. & P. 60.[m]
(*n*) Story v. Richardson, 6 Bing. N. C. 123.[n] The declaration was framed in case, but the plaintiff might have sued alone in assumpsit, per Bosanquet, J., Id. 130.
(*o*) See Skinner v. Lambert, 11 Law Journ., N. S., C. P. 237.
(*p*) Phelps v. Lisle, 10 Ad. & E. 113.[o]
(*q*) Metcalf v. Bruin, 12 East, 400; see Megginson v. Harper, 2 Cr. & M. 322.
(*r*) Lefevre v. Boyle, 3 B. & Ad. 877.[p]
(*s*) Kell v. Nainby, 10 B. & C. 20;[q] Glossop v. Colman, 1 Stark. 25.[r]

[l]Eng. Com. Law Reps. 24. [k]Id. 6. [l]Id. 6. [m]Id. 25. [n]Id. 37. [o]Id. 37. [p]Id. 22. [q]Id. 21. [r]Id. 2.

particular transaction,(t) and he must join in suing on a bill of exchange drawn in the name of the firm including his own.(u)

85. A dormant partner may be joined or not at the election of the ostensible partner;(x) but any defence, as a set-off available against the party actually contracting, would appear to be so against both the partners if they join, the defendant having been ignorant of the partnership;(y) and a personal contract which the defendant was induced to enter into with the ostensible partner, by reason of the confidence reposed in him, cannot it *should seem, be transferred on his retirement to the dormant partner, or enforced subsequently thereto.(z) [*65]

86. If there be any change in the firm, those should be made plaintiffs who composed the firm when the cause of action accrued,(a) though, in the case of a guarantee, the surety is discharged by the retirement of one of the partners,(b) or by the principal taking a partner;(c) but if a note be given to a firm "or order" as a security, it will be a security for advances made after a change in the firm.(d) When one member of a partnership firm becomes bankrupt, the solvent partners have a right to use the names of the bankrupt's assignees on giving them an indemnity against costs;(e) and, on the death of one partner, the survivors must sue expressly as such, without joining the personal representatives of the deceased, for the remedy by action survives to the copartners.(g)

87. Lastly, it must be observed, that counts on individual claims cannot be joined with others in respect of partnership transactions; nor can money had and *received by A. prior to the partnership, and acknowledged by him during it, be set off in an action by A. and B. as partners;(h) but a partner suing as survivor may insert in the declaration a count for a debt due to himself in his separate capacity.(i) [*66]

88. On contracts entered into by a corporate body with one of its own members, either party may sue the other, for, with reference to these,

(t) Teed v. Elworthy, 14 East, 210; Page v. Hiscox, Parsons v. Crosby, cited Id. 213.
(u) Guidon v. Robson, 2 Camp. 302.
(x) Leveck v. Shaftoe, 2 Esp. 468; Stacey v. Decy, Id. 469, n. (a); Cothay v. Fennell, 10 B. & C. 671;[r] Lloyd v. Archbowle, 2 Taunt. 324; Skinner v. Stocks, 4 B. & Ald. 437;[s] Mawman v. Gillet, 2 Taunt. 325, n. (a); Bawden v. Howell, 4 Scott, N. R. 331.
(y) Robson v. Drummond, 2 B. & Ad. 303. 308;[t] Mawman v. Gillett, 2 Taunt. 325, n. (a); Chitt. Contr. 3d ed. 848, 849; but see the remarks on Mawman v. Gillett, 2 Selw. N. P. 10th ed. 1135.
(z) Robson v. Drummond, 2 B. & Ad. 303. 307, 308.[u]
(a) Wilsford v. Wood, 2 Esp. 183.
(b) Dry v. Davy, 10 A. & E. 30;[x] Myers v. Edge, 7 T. R. 254. See further as to this, Chitt. Contr. 3rd ed. 524, 525.
(c) Bellairs v. Ebsworth, 3 Camp. 53.
(d) Pease v. Hirst, 10 B. & C. 122;[y] Per Lord Denman, C. J., 10 A. & E. 31, 32.[x]
(e) Whitehead v. Hughes, 2 Cr. & M. 318.
(g) Per Lord Tenterden, C. J., Jones v. Yates, 9 B. & C. 538;[a] Jell v. Douglas, 4 B. & Ald. 374;[b] Israel v. Simmons, 2 Stark. N. P. C. 356;[c] Martin v. Crump, 2 Salk. 444; S. C. 1 Lord Raymond, 340; Rex v. Collector of Customs, 2 M. & S. 225; Com. Dig. Merchant, (D.); Webber v. Tivill, 2 Wms. Saund. 121 b., and n. (1).
(h) France v. White, 6 Bing. N. C. 33.[d] The effect of a receipt by one partner in the name of the firm, may be destroyed by proving that it was a fraud on the copartners. Farrar v. Hutchinson, 9 A. & E. 641.[e] (i) Chitt. jun. Plead. 152, n. (c).

[r] Eng. Com. Law Reps. 21. [s] Id. 6. [t] Id. 22. [u] Id. 22. [x] Id. 37. [y] Id. 21. [z] Id. 17. [a] Id. 6. [b] Id. 6. [c] Id. 3. [d] Id. 37. [e] Id. 36.

the member contracting is as distinct from the corporation as any third person, and must be deemed a stranger.(*k*)

89. The power of making bye-laws for the recovery of penalties from individual members, by particular officers belonging to the body, is included in the very act of incorporation,(*l*) and the right of suing, being founded on agreement between the members, must be exercised pursuant thereto; and actions for penalties can only be maintained in the names of the officers appointed to recover them,(*m*) and during the period of their official existence: so that where a penalty was imposed on the party refusing to discharge the duties of a certain office on election thereto, and such penalty [*67] was made payable to the master and wardens for the time being, *for the use of the corporation, it was held that an action would not lie at suit of those officers, after ceasing to be such.(*n*)

90. Actions against strangers must be brought in the corporate name, and not in that of the officer contracting on behalf of the corporation, nor of the individuals composing it;(*o*) a foreign corporation may, moreover, sue as such on proof of its being incorporated.(*p*) It may be observed also that acts of Parliament frequently enable corporate bodies to sue, and other parties to sue them in the names of their clerks, treasurers, &c., for the time being.

91. As to the mode in which a corporation may contract, the general rule is, that this can only be done under its corporate seal; and the exceptions to this rule result from the necessity or exigency of particular circumstances; as, where the subject-matter of the contract is of constant requirement and small amount, in which case a corporate body may sue on a parol contract, whether executed or executory, express or implied(*q*)— [*68] *as, in assumpsit for use and occupation, where the tenant has held premises under them, and paid rent.(*r*)

91 *a*. Where a contract does not fall within the exceptions to the

(*k*) Per Parke, J., Dunston v. The Imperial Gas Light and Coke Company, 3 B. & Ad. 132;[f] Per Denman, C. J., Hill v. The Manchester and Salford Waterworks Company, 5 B. & Ad. 875;[g] see Carden v. The General Cemetry Company, 5 Bing. N. C. 257.[h]

(*l*) 2 Selw. N. P. 10th ed. 1158.

(*m*) Per Best, C. J., Radenhurst v. Bates, 3 Bing. 470;[i] Feltmakers' Company v. Davis, 1 B. & P. 98, and cases there cited.

(*n*) Graves v. Colby, 9 A. & E. 356.[k] See The Thames Haven Dock and Railway Company v. Rose, 5 Scott, N. R. 524; Piper v. Chappell, 14 M. & W. 624.[♦]

(*o*) 1 Bla. Com. 474, 475; Bowen v. Morris, 2 Taunt. 374; Cooch v. Goodman, 2 Q. B. 380.[l] See Warde v. Clarke, 12 M. & W. 747.[♦]

(*p*) The National Bank of St. Charles v. De Bernales, 1 C. & P. 569.

(*q*) Per Tindal, C. J., delivering judgment, Gibson v. The East India Company, 5 Bing. N. 270, 271;[m] Beverley v. The Lincoln Gas Light and Coke Company, 6 A. & E. 829, 845;[n] Church v. The Imperial Gas Light and Coke Company, 6 A. & E. 846;[n] Judgment, Arnold v. The Mayor of Poole, 5 Scott, N. R. 775; Reg. v. Mayor of Stamford, 6 Q. B. 433; The City of London Gas Light and Coke Company v. Nicholls, 2 C. & P. 365;[o] The Mayor of Ludlow v. Charlton, 6 M. & W. 815,[♦] cited and recognised in 5 Scott, N. R. 775, where the general rule was applied, and it was held that the appointment of an attorney by a municipal corporation (except in the case of the City of London,) must be under the corporate seal. Post, s. 216.

(*r*) The Mayor of Stafford v. Till, 4 Bing. 75;[p] The Mayor, &c. of Carmarthen v. Lewis, 6 C. & P. 608;[q] The Dean and Chapter of Rochester v. Pierce, 1 Camp. 466; The Mayor of London v. Hunt, 3 Lev. 37.

[f]Eng. Com. Law Reps. 23. [g]Id. 27. [h]Id. 35. [i]Id. 11. [k]Id. 36. [l]Id. 42. [m]Id. 35. [n]Id. 33. [o]Id. 12. [p]Id. 13. [q]Id. 25. [♦]Reprinted at $2.50 per vol.

general rule mentioned in the preceding section, yet if it be *executed* on the part of the corporation, and if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the corporation, such parties are bound by the contract, and are liable to be sued thereon by the corporation; and even where the contract put in suit by the corporation has been on their part *executory* only, not executed, it seems that their suing upon the contract amounts to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up as an objection in a cross action that it was not sealed with their common seal.(*s*)

91 *b*. Where the members of a corporation were all ousted from their offices, but the corporation was subsequently revived by charter, it was held, that the revived *corporation might maintain an action on a bond given to its predecessors.(*t*) [*69]

92. By stat. 1 Vict. c. 73, s. 3, the crown is empowered to provide by the letters patent, granted in pursuance of that act to any joint-stock company, that all suits shall be commenced and prosecuted by one of two officers appointed to sue and be sued on behalf of the company; and by sect. 22, it is provided, that no suit commenced in the name of such officer, shall abate by his death or removal.(*u*) Under the stat. 8 & 9 Vict. c. 16, s. 97, moreover, any joint-stock company is empowered to sue on contracts made according to the provisions of that act.

93. Lastly, by 7 Geo. 4, c. 46, s. 9, and 1 & 2 Vict. c. 96, s. 1, made perpetual by 5 & 6 Vict. c. 85, any banking copartnership carrying on business under the provisions of those acts may sue by its public officer, who may likewise sue and be sued by any member of the copartnership, either solely or jointly with any other person, as the case may require, in respect of any claim by or against the company.(*x*) And the recent statute 7 & 8 Vict. c. 113, for the regulation of joint-stock banks established after the 6th of May, 1844, contains a similar provision.(*y*)

(*s*) Judgment, The Fishmongers' Company v. Robertson, 6 Scott, N. R. 105, 106; Reg. v. The Mayor of Thetford, 2 Ld. Raym. 848; The Barber Surgeons of London v. Pelson, 2 Lev. 252; The East London Waterworks Company v. Bailey, 4 Bing. 287.[r]

(*t*) Mayor of Colchester v. Seaber, 3 Burr. 1866; The Mayor, &c. of Colchester v. Brooke, 15 L. J., N. S., Q. B., 173; see Rex v. Pasmore, 3 T. R. 199; 2 Bla. Com. 430.

(*u*) See also the Joint Stock Companies' Registration Act, 7 & 8 Vict. c. 110, ss. 25. 44, and see the Appendix.

(*x*) See Wilson v. Craven, 8 M. & W. 584;[♦] Robertson v. Sheward, 1 Scott, N. R. 419; Davidson v. Bower, 5 Scott, N. R. 538; Fletcher v. Crosbie, 9 M. & W. 252;[♦] per Parke, B., Steward v. Dunn, 12 M. & W. 664;[♦] Powles v. Page, 15 L. J., N. S., C. P. 217.

(*y*) S. 8. See the Appendix.

[r] Eng. Com. Law Reps. 13. [♦] Reprinted at $2.50 per vol.

[*70] *CHAPTER III.

HUSBAND AND WIFE—INFANT—ALIEN(a)—CIVIL DEATH.

Legal Effect of Marriage, s. 94. When the Husband must sue alone, ss. 95—98. When the Wife must sue alone—General Rule and Exceptions, ss. 99—101. When the Husband may elect to sue alone or jointly with his Wife, ss. 102—107. When the Husband and Wife must sue jointly, ss. 108—110. Infant, Non Compos Mentis, Alien, Outlaw, &c., ss. 111—114.

94. THE effect of marriage at common law is, to merge the separate existence of the wife during coverture, to vest in the husband during such period a right to the rents and profits of the wife's real estate, the interest in her chattels real, and the power of disposing of them, except by will; the right of reducing into possession her chattels real and choses in action; and an absolute property in the rest of her personal estate, in possession:(b) and where property real or personal falls to the wife during coverture, the husband acquires a similar interest therein;(c) as, in chattels purchased by the wife out of money settled to her separate use before marriage.(d) However, if the husband do not exercise the power of disposing of his wife's chattels real, or of reducing into possession either her chattels real or choses in action, *these descriptions of personalty survive to the [*71] wife; but if the husband be the survivor, although chattels real which he previously held in right of his wife thereupon vest absolutely in him, yet he must sue for chattels real, if not in possession, as well as for choses in action, as administrator to his wife, and not in his individual character; and on his death, her representatives, and not his, must sue for their recovery.(d) It may also be proper to add, that, in personal actions, a marriage de facto is sufficient to entitle husband and wife to recover in right of the latter.(f)

95. We shall next proceed to consider, first, when the husband must sue without joining the wife; secondly, when the wife may sue alone; thirdly, when the husband may elect to sue alone, or jointly with his wife; and fourthly, when the husband and wife must join. And first, by reason of the merger of the wife's separate existence, her incapacity to contract, and the vesting of her property in her husband,(g) as the legal consequence of coverture, it follows, that the husband must sue alone for wages(h) accruing

(a) As to the recent statute 7 & 8 Vict. c. 66, vide Appendix.

(b) Com. Dig. Bar. and Feme, (E.); Bac. Ab. Bar. and Feme, (C.); 2 Bla. Com. 433—435; Co. Litt. 300, a.; Maddox v. Winne, 3 Salk. 62. See Rowcliffe v. Edmonds, 7 M. & W. 12.♦

(c) Com. Dig. Bar. and Feme, (E. 3); Bac. Ab. Bar. and Feme, (D.); Agar v. Blethyn, 2 Cr. M. & R. 699. (d) Carne v. Brice, 7 M. & W. 183.♦

(e) Com. Dig. Bar. & Feme, (E.) (F.); Bac. Ab. Bar. and Feme, (C. 2 and 3); Id. Executors and Administrators, (H. 4); 2 Bla. Com. 434, 435; Betts v. Kimpton, 2 B. & Ad. 273;* Per Lord Tenterden, C. J., Richards v. Richards, 2 B. & Ad. 452—454;* Co. Co. Litt, 46, b., 299, b., 300, a., 351, b.

(f) Machell v. Garrett, 3 Salk. 64; Norwood v. Stevenson, Andrews, 227.

(g) Sect. 94.

(h) Per Lord Abinger, C. B., Dengate v. Gardiner, 4 M. & W. 7. See Glover v. Proprietors of Drury Lane, 2 Chitt. R. 117.

*Eng. Com. Law Reps. 22. ♦Reprinted at $2.50 per vol.

to his wife, *and for the profits of a business carried on by her,(k) during coverture; for her work and labour;(l) goods sold or money lent by her during such period;(m) for to all these he is solely and absolutely entitled. [*72]

96. And although, as we shall presently see,(n) the wife must in general be joined in respect of a contract made with her dum sola, yet if a fresh promise in renewal of such contract be made to the husband alone, or some new consideration moving from him, as forbearance, the right of action on such promise is vested in him alone; and this rule applies where such right of action is vested in the wife before marriage in autre droit.(o)

97. At law, a married woman is incompetent to enter into an executory agreement,(p) except as the agent of her husband (although a subsequent ratification by him of such an agreement might, in some cases, be sufficient;(q)) and such a contract is absolutely void: but *if an allegation of such a contract be inserted in the declaration, which also discloses a sufficient consideration moving from her, it will, after verdict, be rejected as surplusage; and further, it will be presumed that the defendant's promise was made to the plaintiffs, although not expressly stated so to be.(r) But where(s) an action was brought by husband and wife for use and occupation (though it does not appear whose lands were used and occupied,(t) and for money had and received to the use of the plaintiffs, with an allegation of a promise to them jointly, judgment for the plaintiffs was reversed on error; for the promise could give no interest to the wife. So, where the cause of action was money received of husband and wife by the hands of the latter, and the promise was laid to both jointly, the judgment for plaintiffs was arrested after verdict; for the money was the property of the husband alone, and the promise to the wife was void.(u) But the authority of this case seems questionable; as perhaps a sufficient consideration moving from the wife would, after verdict, be intended.(x) [*73]

98. The husband surviving is absolutely entitled to *the wife's chattels real and personal, in possession;(y) and for rent accruing in her right, and in arrear at her death, an action of debt, as well as the right to distrain, is given to him by statute;(z) though for rent subsequently [*74]

(k) Saville v. Sweeny, 4 B. & Ad. 514. 522. 524.[t]

(l) Buckley v. Collier, 1 Salk. 114; 3 Id. 63; Bac. Ab. Bar. and Feme, (D.); but see per Cur., Holmes v. Wood, cited, 2 Wils. 424.

(m) Com. Dig. Bar. and Feme, (W.); Holmes v. Wood, 1 Barnard, 75. 249, cited, 2 Wils. 424, and 2 M. & S. 396; Bidgood v. Way, 2 W. Bla. 1236; King v. Basingham, 8 Mod. 199. 341.

(n) Post, s. 108.

(o) Per Lord Ellenborough, C. J., Rumsey v. George, 1 M. & S. 180; Yard v. Ellard, 1 Salk. 117; and at more length in Lord Raymond, 368; Per Denman, C. J., Nurse v. Wills, 4 B. & Ad. 744;[t] Lee v. Wynne, Cro. Jac. 110; Bac. Ab. Bar. and Feme, (K).

(p) Com. Dig. Bar. & Feme, (Q.).

(q) See the remarks in Chitt. Contr. 3rd ed. p. 160, on Smith v. Plomer, 15 East, 607, and Sanderson v. Griffiths, 5 B. & C. 909.[u]

(r) Nurse v. Wills, 4 B. & Ad. 739;[x] affirmed in error, 1 A. & E. 65.[y]

(s) Bidgood v. Way, 2 W. Bla. 1236, cited, 4 B. & Ad. 742,[x] 1 A. & E. 73.[y]

(t) See per Lord Ellenborough, C. J., 3 East, 106; Wills v. Nurse, 1 A. & E. 73.[y]

(u) Abbot v. Blofield, Cro. Jac. 644.

(x) Bourn v. Mattaire, Andrews, 244; Selw. N. P. 10th ed. 295.

(y) Ante, s. 94. A sci. fa. by baron and feme on a judgment recovered by feme whilst sole survives to the husband. Gresham v. Woodyer, 1 Salk. 116.

(z) 32 H. 8, c. 37, s. 3; Co. Litt. 351, a.

[t]Eng. Com. Law Reps. 24. [u]Id. 12. [x]Id. 24. [y]Id. 28. *Reprinted at $2.50. per vol.

accruing under a joint lease from husband and wife, no action can be maintained by the husband, whose interest has determined by the wife's death.(*a*) The husband is also entitled to administer to the wife(*b*) (unless the marriage was void ab initio ;(*c*)) and he must sue in his representative character in order to recover her chattels real and personal not previously reduced into possession, whether vesting in her whilst sole or covert; as also on any cause of action which had accrued to her in autre droit.(*d*)

99. Secondly.—With respect to the wife it is a general rule, that she cannot sue alone at common law; and this is a necessary legal consequence of marriage ;(*e*) and the rule in suits in equity is, in ordinary cases, the same, subject, however, to some exceptions wholly unknown at law.(*g*) Hence, a feme covert cannot sue without her husband in the superior courts [*75] at *Westminster, as a sole trader by the custom of the city of London.(*h*) The wife's disability to sue alone ceases, however, if the marriage be formally pronounced, or be discovered, to be void ab initio ;(*i*) or if it be dissolved by a divorce a vinculo matrimonii ;(*k*) but not if a sentence of divorce a mensâ et thoro be pronounced, nor if the parties execute a deed securing a separate maintenance to the wife.(*l*)

100. A feme covert may also sue alone if the husband be civiliter mortuus, whether permanently or for a term, by reason of his exile or banishment,(*m*) attainder,(*n*) or transportation,(*o*) under a judicial sentence (though the term of transportation be passed at the hulks ;(*p*)) but the wife's right to sue ceases on the reversal of the outlawry on attainder, or pardon of the offence, or on having undergone the punishment awarded to it.(*q*) Abjura- [*76] tion of the realm was equivalent to *the civil death of the party abjuring, and entailed similar consequences.(*r*) Again, where the husband is an alien enemy, his position is analogous to that of a person transported ;(*s*) and in this case, it appears that the wife resident in this country may sue as a feme sole. But it seems doubtful whether this exception would include the wife of an alien ami who had never resided in this coun-

(*a*) Hill v. Saunders, 4 B. & C. 529. (*b*) 2 Bla. Com. 435.
(*c*) Haydon v. Gould, 1 Salk. 119.
(*d*) Com. Dig. Bar. and Feme, (E. 2, 3); Co. Litt. 351, b; 2 Bla. Com. 435.
(*e*) Co. Litt. 132, b; Bac. Ab. Bar. and Feme, (M.); 1 Bla. Com. 443; Story, Eq. Pl. s. 61. (*g*) Story, Eq. Pl. s. 61.
(*h*) Caudell v. Shaw, 4 T. R. 361; Per De Grey, C. J., 2 W. Bla. 1081; and see the judgment in Beard v. Webb, 2 B. & P. 97.
(*i*) See Anstey v. Manners, 1 Gow, R. 10 ;[a] Glasspole v. Young, 9 B. & C. 696.[b]
(*k*) See Marshall v. Rutton, 8 T. R. 548.
(*l*) Per Abbott, C. J., Lewis v. Lee, 3 B. & C. 297 ;[c] 1 Selw. N. P. 10th ed. 283.
(*m*) Belknap's case, Co. Litt. 132, b, 133, a; Weyland's case, Id. 133, a; Lean v. Schutz, 2 W. Bla. 1195. 1197, and cases there cited; Hatchett v. Baddely, 2 W. Bla. 1079. 1081, 1082; Bac. Ab. Bar. and Feme, (M.).
(*n*) Co. Litt. 133, a.
(*o*) Jewson v. Read, Lofft, 142; Sparrow v. Carruthers, cited, 1 T. R. 6, and 1 B. & P. 359.
(*p*) Ex parte Franks, 7 Bing. 762 ;[d] and see the cases there cited.
(*q*) In Carrol v. Blencow, 4 Esp. 27, it was held that the wife of a person transported, who remained abroad after the term of transportation had expired, might sue alone; but see Chitt. 3rd ed. 179.
(*r*) Co. Litt. 133, a; arg., Lean v. Schutz, 2 W. Bla. 1197; 4 Bla. Com. 333; Per De Grey, C. J., and Blackstone, J., Hatchett v. Baddeley, 2 W. Bla. 1081, 1082.
(*s*) Per Parke, B., Barden v. De Keverberg, 2 M. & W. 65.

[a] Eng. Com. Law Reps. 5. [b] Id. 17. [c] Id. 10. [d] Id. 20.

try;(*t*) and if the husband be an Englishman, mere residence abroad does not render the wife competent to sue as a feme sole.(*u*) The last exception to the general rule is, where the husband is dead in legal presumption; and this presumption arises after the lapse of seven years, if, having gone abroad or absented himself, no account can be given of him during that period.(*x*)

101. If the wife survives she has all real property the fruits of which the husband enjoyed in her right during coverture, and such chattels real and choses in *action, such as debts due before coverture, as he might also in her right have then reduced into possession.(*y*) So, a [*77] bond, note, or cognovit given to a feme covert, either alone or jointly with the husband, survives to her,(*z*) if not reduced into possession by the baron; and, in the event of her death, her personal representatives and not his are consequently entitled to it;(*a*) and, therefore, the administrator of a husband, who survived his wife, and died without taking out administration of her effects, cannot recover her choses in action, but for that purpose administration must be taken out to the wife.(*b*)

102. Thirdly.—Where the cause of action accrues to the husband during coverture, in right of his wife, the former may in general, subject to the previous remarks,(*c*) elect either alone or jointly with the latter; and, in these cases, the wife cannot be improperly joined, if she have such an interest as would survive to her in the event of the husband's death.(*d*) For the recovery of the wife's real property it will be seen that she must sue jointly with her husband;(*e*) but, if the reversion of *an estate be granted [*78] to husband and wife jointly, they may either join in suing the lessee in covenant for not repairing, or the husband alone may bring the action;(*g*) and so it is in the action of debt for not setting out tithes accruing to the husband in right of his wife,(*h*) or for rent in arrear either on the demise of the wife dum sola, or of husband and wife during coverture;(*i*) and on a covenant to husband and wife the husband alone may sue.(*k*)

(*t*) Barden v. De Keverberg, 2 M. & W. 61.♦ See Stretton v. Busnach, 1 Bing. N. C. 139,* where a replication to a plea of coverture, stating that the husband, an alien, had been abroad for eight years, was held bad; and Story Eq. Pl. 51, n. (4,) and cases there collected.

(*u*) Boggett v. Frier, 11 East, 301; Marsh v. Hutchinson, 2 B. & P. 226; Farrer v. Granard, 1 N. R. 80, post, s. 222.

(*x*) Hopewell v. De Pinna, 2 Camp. 113; Doe d. Knight v. Nepean, 5 B. & Ad. 94;[f] Nepean v. Doe d. Knight, 2 M. & W. 894. 913; Doe d. George v. Jesson, 6 East, 85.

(*y*) Com. Dig. Bar. and Feme, (F. 1).

(*z*) Com. Dig. Bar. and Feme, (F. 1).

(*a*) Per Parke, B., Gaters v. Madeley, 6 M. & W. 427, citing Richards v. Richards, 2 B. & Ad. 447;[g] Nash v. Nash, 2 Mad. 133; and qualifying the observation of Lord Ellenborough, C. J., in M'Neilage v. Holloway, 1 B. & Ald. 221.

(*b*) Betts v. Kimpton, 2 B. & Ad. 273.[g]

(*c*) Ante, s. 95.

(*d*) Com. Dig. Bar. and Feme, (X.); Per Coleridge, J., Ayling v. Whicher, 6 A. & E. 264;[h] Per North, C. J., Frosdike v. Sterling, 1 Freeman, 236. (*e*) Post, s. 108.

(*g*) Bret v. Cumberland, Cro. Jac. 399; Com. Dig Bar. and Feme, (X.) But see Middlemore v. Goodale, Cro. Car. 503. 505, where it was held that husband and wife, joint assignees of land, must join in suing on a covenant for further assurance. Woodfall, L. & T. 4th ed. 190.

(*h*) Beadle v. Sherman, Cro. Eliz. 608, 613; Arnold v. Bidgood, Cro. Jac. 318. See Ford v. Pomeroy, Noy, R. 136. (*i*) Com. Dig. Bar. and Feme, (X.)

(*k*) Beaver v. Lane, 2 Mod. 217; Arnold v. Revoult, 1 B. & C. 443;[i] Anon., 1 Bulstr. 31. As to a covenant with the wife and breach before marriage, see post, s. 108.

*Eng. Com. Law Reps. 27. [f]Id. [g]Id. 22. [h]Id. 33. [i]Id. 5. ♦Reprinted at $2.50 per vol.

103. With respect to choses in action accruing to a feme covert, these survive to her; but the husband may reduce them into possession by suing either in his own name or in the joint names of himself and his wife; and the general rule is, that when a chose in action, such as a bond(*l*) or note is given to a feme covert, the husband may elect to let his wife have the benefit of it, or, if he *thinks proper, he may take it himself;(*m*) and, if the husband in his lifetime brings an action upon the instrument in his own name, that will amount to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and, in that case, the remedy on it survives to the wife; or he may, according to the decision in Philliskirk v. Pluckwell,(*n*) adopt another course, and join her name with his own, and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the bond or note, as the judgment would survive to her.(*o*)

[*79]

104. On an award to pay money to the wife, or on a bond to husband and wife, or to a husband and wife administratrix, the same right of election vests in the husband,(*p*) as also in the case of a judgment recovered by both, for this would survive to the wife;(*q*) so that, although the husband could not sue alone on a bond to the wife dum sola,(*r*) yet, if judgment thereon be *recovered by husband and wife, that which was before a chose in action transit in rem judicatam, and becomes of a different nature from what it was before the coverture; and, on such judgment, the husband may sue either alone or jointly with the wife.(*s*)

[*80]

105. We have already seen that the earnings of the wife, by her work and labour, accrue solely to the husband;(*t*) but it has been held, that if A. promises B., a feme covert, a certain sum in consideration of her effecting a cure, which she does accordingly effect, she may join with her husband in assumpsit for recovery of this money, as being the meritorious cause of action.(*u*) And the same has been held, where the action was for money advanced,(*x*) or work and labour performed by the wife during coverture,(*y*)

(*l*) Vin. Ab. Bar. and Feme, (T. 16); Bac. Ab. Bar. and Feme, (K.); Day v. Padrone, 2 M. & S. 396, n. (*b*); Beaver v. Lane, 2 Mod. 217; Per Lord Hardwicke, C., Bates v. Dandy, 2 Atk. 208; Howell v. Maine, 3 Lev. 403; 3 Salk. 64,—S. C. nom. Powell v. Maine, which is incorrectly reported, the bond having been to the wife during coverture, and not whilst sole; Per Dampier, J., 2 M. & S. 396; 1 Selw. N. P. 10th ed. 293, (13).

(*m*) As by indorsing it in his own name; Mason v. Morgan, 2 A. & E. 30.[k]

(*n*) 2 M. & S. 393.

(*o*) See per Parke, B., Gaters v. Madeley, 6 M. & W. 426, 427;[♦] Per Lord Hardwicke, C., Garforth v. Bradley, 2 Ves. 676, 677; Burrough v. Moss, 10 B. & C. 558.[l]

(*p*) Ankerstein v. Clarke, 4 T. R. 616, recognized Per Park, J., Arnold v. Revoult, 1 B. & B. 445;[m] Com. Dig. Bar. and Feme, (X).

(*q*) Per Denman, C. J., Nurse v. Wills, 4 B. & Ad. 744;[n] Per Parke, B., Gaters v. Madeley, 6 M. & W. 427; Butler v. Delt, Cro. Eliz. 844; Com. Dig. Bar. and Feme, (F. 1); 2 Bla. Com. 434.

(*r*) Post, s. 108.

(*s*) Woolverston v. Fynnimore, cited, 1 Selw. N. P. 10th ed. 294.

(*t*) Ante, s. 95.

(*u*) Brashford v. Buckingham, Cro. Jac. 77. 205; Com. Dig. Bar. and Feme, (X).

(*x*) Prat v. Taylor. Cro. Eliz. 61; but see 1 A. & E. 74.[o]

(*y*) Buckley v. Collier, 1 Salk. 114; 3 Id. 63; Holmes v. Wood, 1 Barnard, 75. 249; cited 2 Wils. 424.

[k]Eng. Com. Law Reps. 29. [l]Id. 21. [m]Id. 5. [n]Id. 24. [o]Id. 28.
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if an express promise to her be alleged;(z) but if on such a ground of action the husband sue alone, and the defence be payment to the wife, the plea should allege payment, either to the husband, in which case the wife's authority to receive such payment will be a question for the jury, or to the wife, with an express averment of her possessing such authority.(a)

106. It appears, however, difficult to define the nature *of the interest, which might entitle a feme covert to join in suing with her husband, and which has been said(b) to form a substratum on which her right so to do is founded. In an action on an agreement made between A. and his wife and others (the plaintiffs) of the one part, and defendant of the other; it appeared that the plaintiffs having sued and obtained a cognovit from another party, for whom the defendant was bail; the latter, on forfeiture of the bailbond, requested forbearance from the plaintiffs towards his principal and himself, promising, in consideration of such forbearance, either to render his principal on a certain day or to pay the amount due; and it was held that, although the promise of forbearance was void quoad the wife, being in a legal view the promise of the husband, yet that it must be taken to refer to a subject-matter in which the wife was interested, and whereby she was aggrieved, being a party to the original suit; and that defendant's promise must, after verdict, be taken to be made to the plaintiffs, and consequently to the wife inclusive, although not expressly so alleged.(c) [*81]

107. When a cause of action has become vested in the wife before marriage, and a fresh promise is made to her husband and self, in respect of some new consideration moving from them jointly, as forbearance, the right of suit on such new promise is in the husband alone, or husband and wife jointly,(d) although on the *original promise husband and wife must have joined;(e) nor does it make any difference in this respect, if the cause of action accrued to the wife in autre droit;(f) but the character of the original debt is not thus altered by stating an account concerning it with the husband on behalf of himself and his wife.(g) [*82]

108. Fourthly.—Husband and wife must, it has been held, sue jointly for breach of a covenant running with land of which they are joint assignees.(h) So they must join in debt for rent, due before the coverture under a lease by the feme whilst sole, and in detinue for charters of the wife's inheritance;(i) and it is a general rule that, when a complete cause of action has accrued to the wife dum sola, as for breach of covenant, or on a bond, bill of exchange or promissory note, or in respect of a debt then due

(z) Bac. Ab. Bar. and Feme, (K.); Selw. N. P. 10th ed. 290, n. (7); Hilliard v. Hambridge, Aleyn, 36, where the promise was to husband and wife.

(a) Offley v. Clay, 2 Scott, N. R. 372.

(b) Per Tindal, C. J., 1 A. & E. 75.[p] See Bendix v. Wakeman, 12 M. & W. 97;[♦] Guyard v. Sutton, 15 L. J., N. S., C. P. 225.

(c) Nurse v. Wills, 4 B. & Ad. 739;[q] affirmed on error, 1 A. & E. 65;[p] and see the cases there collected.

(d) Per Lord Lyndhurst, C. B., Willis v. Nurse, in error, 1 A. & E. 72.[p]

(e) Post, s. 108. (f) Ante, s. 96; and Wills v. Nurse, supra.

(g) Hopkins v. Logan, 5 M. & W. 241.[♦]

(h) Middlemore v. Goodale, Cro. Car. 503. 505; Woodfall, L. & T. 4th ed. 190. See Wootton v. Steffenoni, 12 M. & W. 129.[♦]

(i) Com. Dig. Bar. & Feme, (V.); Co. Litt. 55, b.; Brereton v. Evans, Cro. Eliz. 700.

[p]Eng. Com. Law Rep. 28. [q]Id. 24. [♦]Reprinted by T. & J. W. J. at $2.50 per vol.

the baron and feme must sue jointly.(*k*) It seems also (notwithstanding some contrary decisions) that they must sue jointly on choses in action [*83] vested in the feme before marrriage,(*l*) in cases *where the cause of action accrued subsequently.(*m*) And in a very recent case it was held, that an action could not be maintained by the assignees of a bankrupt on a promissory note given to the bankrupt's wife dum sola, and payable on demand, the Court intimating an opinion that the action might have been brought by the assignee and the wife jointly, or that if it had been brought by the husband and wife, and the husband's bankruptcy had been pleaded in bar, such plea might have been answered by shewing that the action was, in fact, the action of the assignees, and that the husband's name was used by their direction, and for their benefit.(*n*)

109. So in assumpsit by husband and wife, a replication to a plea of bankruptcy of the husband, and due appointment of assignees, stated, that the debts declared on, due to the wife before coverture, were then assigned to trustees in trust for herself, and afterwards for children; that the husband and wife (the plaintiffs) appointed such trustees their attorneys for the recovery of the said debts; and that for such purpose, and for the sole benefit of the wife and children, the action was brought in the names of the plaintiffs, by direction of the trustees; and this was held good on special [*84] demurrer, *the right to sue on a chose in action so assigned not passing to the assignees of the husband.(*o*)

110. Lastly.—For all causes of action on any implied promise which accrued to the wife in autre droit, and which therefore survive to her,(*p*) she must be joined with her husband;(*q*) and if part of the assets of the testator be paid to defendant during the coverture of the executrix, it has been held, that she must join with her husband for its recovery, and declare in her representative character.(*r*)

111. Infancy confers a personal privilege, of which none can take advantage but the infant himself; therefore an infant may sue on a contract entered into with him;(*s*) as for a breach of promise of marriage;(*t*) but an

(*k*) Where a feme sole, having commenced an action, marries before trial, the husband need not be made a party to the suit by scire facias. Walker v. Golling, 11 M. & W. 78.♦

(*l*) See Hopkins v. Logan, 5 M. & W. 241;♦ Rumsey v. George, 1 M. & S. 180, 181; Com. Dig. Bar. & Feme, (V.); Bac. Ab. Bar. & Feme, (K.); 1 Roll. Ab. 347, R. pl. 3; arg. Rose v. Bowler, 1 H. Bl. 109; Per Lord Kenyon, C. J., Milner v. Milnes, 3 T. R. 631; Per Lord Hardwicke, C., Bates v. Dandy, 2 Atk. 208.

(*m*) In M'Neilage v. Holloway, 1 B. & Ald. 218, it was held that the husband might sue alone on a bill of exchange to the wife before marriage, which became due afterwards; but see Per Parke, B., Gaters v. Madeley, 6 M. & W. 427;♦ Richards v. Richards, 2 B. & Ad. 452, 453;[r] Nash v. Nash, 2 Mad. 133; Judgment, Hart v. Stevens, 14 L. J., N. S., Q. B., 148; Scarpillini v. Atcheson, Id. 333.

(*n*) Sherrington v. Yates, (in error), 12 M. & W. 855,♦ reversing judgment in S. C. 11 M. & W. 42;♦ Pierce v. Thornely, 2 Sim. 167; Mitford v. Mitford, 9 Ves. jun. 87.

(*o*) Parnham v. Hurst, 8 M. & W. 743.♦

(*p*) Co. Litt. 351, b; Richards v. Richards, 2 B. & Ad. 447;[s] Beamond v. Long, Cro. Car. 208. 227.

(*q*) Com. Dig. Bar. & Feme, (V.); Bac. Ab. Bar. & Feme, (K.); Field v. Allen, 9 M. & W. 694.♦

(*r*) Anon., 1 Salk. 282; Com. Dig. Bar. & Feme, (V.) See Yard v. Ellard, 1 Salk. 117; Chitt. Pl., 5th ed. vol. i. 34.

(*s*) Warwick v. Bruce, 2 M. & S. 205; Bac. Ab. Infancy, (I. 4.)

(*t*) Holt v. Ward, 2 Stra. 937.

[r]Eng. Com. Law Reps. 22. [s]Id. 22. ♦Reprinted at $2.50 per vol.

infant cannot sue on a penal statute, for the informer must appear in person, or by attorney ;(*u*) whereas an infant can only sue by guardian or prochein ami.(*x*) The prochein ami not being, however, a party to the suit, but simply a person appointed by the Court to look after the interests of the infant, and manage the suit for him.(*y*)

112. A person non compos mentis may maintain *an action, which should be brought in his own name, and not in that of his committee ;(*z*) and the wife of a lunatic who has no committee, has sufficient implied authority to sue in his name.(*a*) An idiot being incapable of appointing an attorney must sue in person ; but a lunatic may sue either in person or by attorney.(*b*) [*85]

113. An alien friend may bring an action concerning personal property ; but he cannot hold real property, which, upon office found, vests in the crown ;(*c*) and no action can be maintained either by or in favour of an alien enemy,(*d*) unless resident here by the king's license,(*e*) or unless the contract declared on be expressly sanctioned by the crown, as if it be effected under a trading license.(*g*) It seems, however, that when the right accrued previous to the alien becoming an enemy, the remedy is only suspended during war.(*h*)

114. Similar to the case of an alien enemy, as regards the temporary incapacity of suing on a contract, is that of a person civiliter mortuus, as an outlaw or an attainted *felon.(*i*) But the right of these persons to the protection of the law is only suspended, not irrevocably lost ; the disability may be removed by a pardon or reversal of the outlawry, or attainder, or, it should seem, by suffering the punishment inflicted for the crime ; and as a matter of course, the competency to contract, and right to sue, revive.(*k*) And although an outlaw is not entitled to come into a court of justice to establish a demand of his own ; yet he has a right to come into court to get rid of irregular proceedings, or, in other words, to complain that the power of the court has been used improperly against him.(*l*) [*86]

(*u*) 18 Eliz. c. 5, s. 1.

(*x*) Chitt. Stat. 762, n. (*b*); 2 Chitt. Arch. Pr., 7th ed. 889. See Morgan v. Thorne, 7 M. & W. 400 ;♦ Watson v. Frazer, 8 M. & W. 660 ;♦ Gilbert v. Schwenck, 14 M. & W. 488.♦

(*y*) Sinclair v. Sinclair, 13 M. & W. 640 ;♦ Duckitt v. Satchwell, 12 M. & W. 779.♦ As to 9 & 10 Vict. c. 95, s. 64, see Appendix.

(*z*) Cocks v. Darson, Hobart, 215 ; Thorn v. Coward, 2 Sid. 124.

(*a*) Rock v. Slade, 7 Dowl. 22. (*b*) 2 Chitt. Arch. Pr. 7th ed. 909.

(*c*) Co. Litt. 2, b. ; and Mr. Hargrave's Notes, Id. 129, b. ; 1 Bla. Com. 372. But see post, p. 238 *a*.

(*d*) Co. Litt. 129, b. ; Brandon v. Nesbitt, 6 T. R. 23 ; O'Mealey v. Wilson, 1 Camp. 482. See M'Connell v. Hector, 3 B. & P. 113.

(*e*) Wells v. Williams, 1 Salk. 46 ; Casseres v. Bell, 8 T. R. 166 ; Co. Litt. 129, b. Mr. Hargrave's note (3).

(*g*) Fenton v. Pearson, 15 East, 418.

(*h*) Co. Litt. 129, b. ; Flindt v. Waters, 15 East, 260.

(*i*) 3 Bla. Com. 284 ; Litt. s. 197 ; Co. Litt. 128, a., 129, b. ; Bullock v. Dodds, 2 B. & Ald. 258, 275 ; 2 Chitt. Arch. Pr. 7th ed. 926 ; Aldridge v. Buller, 2 M. & W. 412 ;♦ Walker v. Thellusson, 11 Law Journ., N. S., Q. B. 14.

(*k*) Chitt. jun. Contr. 3rd ed. 184. Outlawry may always be pleaded in abatement ; Litt. s. 197 ; Co. Litt. 128, b. ; and in bar, if the cause of action be forfeited ; Bac. Ab. Outlawry, (D. 3).

(*l*) Per Wightham, J., Walker v. Thellusson, 11 Law Journ., N. S., Q. B. 14, 15 ; Hawkins v. Hall, 8 Id., Chanc. 225.

[*87] *CHAPTER IV.

1. BANKRUPTCY AND INSOLVENCY, ss. 115—128.

2. EXECUTORS AND ADMINISTRATORS, ss. 129—136.

1. Bankruptcy and Insolvency.

1. Legal effect of Bankruptcy, s. 115. Right of the Assignees to sue, ss. 116—118. Rule as to the Joinder of Assignees, and in case of a New Appointment, ss. 119—121. Right of the Bankrupt to sue, ss. 122—124. Legal effect of Insolvency, s. 125. Right of the Assignee and of the Insolvent to sue, ss. 126—128.

115. The effect of bankruptcy is, to vest in the official and creditors' assignees, on their appointment, (or in the trustee under 7 & 8 Vict. c. 70, s. 8), without any conveyance or deed of assignment, all such real and personal estate of the bankrupt as he was equitably as well as legally entitled to at the date of the act of bankruptcy;(*a*) and for property of this description the assignees are empowered to sue in their own names.(*b*) The title of the assignees, moreover, to the bankrupt's real property, dates from their appointment, and their title to his personal property relates back [*88] to the act of bankruptcy;(*c*) *but the harsh effect of this doctrine of relation has been mitigated by the provision of the statutes 6 Geo. 4, c. 16, s. 82, and 2 & 3 Vict., c. 29, s. 1, which were framed with a view to the protection of persons bonâ fide, and without notice of the act of bankruptcy, paying money to or contracting or dealing with a bankrupt after such act of bankruptcy, but before the date and issuing of the fiat.(*d*)

115 *a*. The effect then of the various provisions in the enactments relating to bankrupts, is to give the assignees of an uncertified bankrupt the beneficial interest in all property acquired and contracts entered into by him, and to make the bankrupt acquire property or contract for their benefit only, and in the character of an agent for them, so that they may, whenever they please, disaffirm his act, which is however valid until they do so. When therefore an uncertificated bankrupt enters into a contract, he may sue thereon in his own name; and it is no plea that the property is vested in, or the contract made, for the benefit of the assignees, unless it contains an averment that they have interfered. The same rule applies in the case of a bankrupt who has been twice certificated, but who has not paid 15*s*. in the pound under the second fiat, with respect to property acquired or contracts entered into by him since the certificate.(*e*)

(*a*) 1 & 2 Will. 4, c. 86, ss. 22. 25, 26; 6 Geo. 4, c. 16, s. 63, 64, 65; 5 & 6 Vict. c. 122, ss. 48. 51. 53; per Pollock, C. B., M'Intyre v. Miller, 13 M. & W. 730; D'Arnay v. Chesneau, 13 M. & W. 796; Trott v. Smith, 12 M. & W. 688; Mogg v. Baker, 3 M. & W. 195; per Parke, B., Britten v. Perrot, 2 Cr. & M. 600.

(*b*) Supra, Dunn v. Hill, 11 M. & W. 470. As to actions by the assignees of a Joint Stock Company, see 7 & 8 Vict. c. 111, s. 8. By assignee of a bankrupt member of a firm, and solvent partner, see 5 & 6 Vict. c. 122, s. 31.

(*c*) See the judgment, 14 M. & W. 273, 274.

(*d*) Kynaston v. Crouch, 14 M. & W. 266; Pearson v. Graham, 6 A. & E. 899; per Coleridge J., Rothwell v. Timbrell, 1 Dowl, N. S. 778.

(*e*) Herbert v. Sayer, 5 Q. B. 965, 974,[t] overruling as this point Young v. Rishworth,

[t] Eng. Com. Law Reps. 48.

*116. The assignees then are the proper parties to sue on choses in action accruing to them in right of the bankrupt;(g) or for the [*89] recovery of damages for breach of a contract committed previous to the bankruptcy, in which case they would be entitled to recover all that the bankrupt could have recovered for the breach of the contract declared upon.(h)

117. Not only may the assignees recover unliquidated damages for a breach of contract with the bankrupt, where the right thereto has fully accrued before the bankruptcy, but they may, through the bankrupt as their agent, complete such contracts as are *in fieri* at the time of issuing the fiat, and recover upon them when completed, in their own names as assignees; for instance, where the defendant gave an order for certain engravings to the bankrupts after the act of bankruptcy, but before the issuing of the fiat, and part of the work was done before the fiat, a part after the fiat, and before the appointment of the creditors' assignee, and the remainder after the appointment of the creditors' assignee; and it appeared that after the fiat the bankrupt applied to one of the plaintiffs who was then petitioning creditor for *money to complete the work in question, [*90] which he received; it was held in an action brought by the official assignee and the assignee of the creditors, that the assignees were entitled to recover for the whole amount of work done, the contract being entire, and the evidence showing that it had been completed by the bankrupts as their agents.(i)

118. Where, however, the primary cause of action is the personal injury to the bankrupt resulting from breach of contract, as of a contract to cure or to marry, and where the consequential damage to the personal estate follows from the injury to the person, it may be so dependent upon and inseparable from it, that no right to maintain a separate action in respect of such consequential damage will pass to the assignees. But if the breach of contract does not cause the bankrupt any other injury than the diminution of his personal estate, the right of action will pass to the assignees as part of the personal estate, it being a matter belonging to the bankrupt whereof profit may be made.(k)

118 *a*. There is another class of cases, moreover in which the assignees will have no right of action on a contract entered into with the bankrupt,

8 A. & E. 470,[u] and recognising Kitchen v. Bartsch, 7 East, 53. Young v. Rishworth, however, also decided, that 6 Geo. 4, c. 16, s. 127, was retrospective in its operation. See Elston v. Braddick, 2 Cr. & M. 435; Benjamin v. Belcher, 11 A. & E. 350;[x] Carew v. Edwards, 4 B. & Ad. 351;[y] Perkins v. Adcock, 15 L. J., N. S., Ex., 7.

(g) Per Parke, J., Kearsey v. Carstairs, 2 B. & Ad. 724;[z] Schondler v. Wace, 1 Camp. 487; Clay v. Harrison, 10 B. & C. 99;[b] Power v. Butcher, 10 B. & C. 329;[b] Brandon v. Pate, 2 H. Bla. 308; Chandler v. Gardiner, cited 2 B. & Ad. 734;[z] Savory v. Chapman 11 A. & E. 829.[x]

(h) Hill v. Smith, 12 M. & W. 618;[♦] Alder v. Keighley, 15 L. J., N. S., Ex., 100; Porter v. Vorley, 9 Bing. 93. 95.[c] Wright v. Fairfield, 2 B. & Ad. 727.[a]

(i) Whitmore v. Gilmour, 12 M. & W. 808.[♦] See Gibson v. Carruthers, 8 M. & W. 321;[♦] Lawrence v. Knowles, 5 B. & C. 399.[d]

(k) Drake v. Beckham, 11 M. & W. 315[♦] (in error) reversing judgment in S. C., 8 M. & W. 864.

[u] Eng. Com. Law Rep. 35. [x] Id. 39. [y] Id. 24. [z] Id. 22. [b] Id. 21. [c] Id. 23. [d] Id. 12

[♦] Re-printed at $2,50 per vol.

by reason of a want of mutuality as between themselves and the other contracting party, as where the bankrupt had agreed with the defendant to submit certain matters to arbitration, and the property, which was the subject-matter of the reference, vested in the *assignees by the bankruptcy, the submission not being binding on the assignees, and being no longer mutual could not be enforced by them ;(a) and where lessor and lessee by indenture of demise agreed that the former should take certain fixtures on the determination of the term at a price to be appraised by persons, one of whom was to be named by each party ; and the lessee becoming bankrupt, his assignees declined the lease, which was delivered up: it was held(b) that the latter could not sue the lessor for non-performance of his covenant, in not naming an appraiser, the bankrupt being on his part discharged from all the covenants in the lease.(c)

[*91]

119. All the assignees of a bankrupt, including the official assignee, must join in the action ;(d) and where one of several partners becomes bankrupt, the assignees must sue for a debt due to the firm jointly with the solvent partners ; (e) and, with respect to the character in which assignees should sue, the rule is, that they must *sue as such on a contract by the bankrupt before bankruptcy ; but that this is unnecessary on a contract subsequent thereto, and before certificate, for as all the bankrupt's property is then vested in the assignees, he will be considered as their agent ;(g) and, in the same action, assignees cannot sue as such, and also for claims accrued in their private capacity.(h)

[*92]

120. Under a joint commission against two partners, the assignees may recover in the same action debts due to the partners jointly, and also debts due to them separately ;(i) and, in suing on a separate contract with one partner, they may describe themselves generally as his assignees without noticing the other partner.(k) Assignees, under separate commissions, must describe themselves accordingly ;(l) and they must join in suing for a debt due to the partnership ; but they cannot, in a joint action, recover debts due to the partners separately.(m) The assignees, under an Irish commis-

(a) Marsh v. Wood, 9 B. & C. 659 ;[e] cited per Parke, B., 8 M. & W. 336. Quære whether, under ordinary circumstances, bankruptcy of one of the parties operates as a revocation of the authority of an arbitrator, appointed under an order of Nisi Prius? Tayler v. Marling, 2 Scott, N. R. 374.

(b) Kearsey v. Carstairs, 2 B. & Ad. 716 ;[f] Fairburn v. Eastwood, 6 M. & W. 679.

(c) Stat. 6 Geo. 4, c. 16, s. 75, post, s. 233.

(d) Smellgrove v. Hunt, 1 Chitt. 71 ; Holland v. Phillipps, 10 A. & E. 149 ;[g] Baker v. Neaver, 1 Cr. & M. 112. See Stat. 5 & 6 Vict. c. 122, ss. 48. 53. But two out of three Syndics of a French bankrupt may sue, without naming the third ; Alivon v. Furnival, 1 Cr. M. & R. 277.

(e) Thomason v. Frere, 10 East, 425, 426 ; Lewis v. Edwards, 7 M. & W. 300 ; Anon., 12 Mod. 446 ; Eckhardt v. Wilson, 8 T. R. 140. 142. See 6 Geo. 4, c. 16, s. 89 ; 5 & 6 Vict. c. 122, s. 31.

(g) 1 Selw. N. P. 10th ed. 242, 243 ; Evans v. Mann, Cowp. 569.

(h) Richardson v. Griffin, 5 M. & S. 294, 297.

(i) Per Lord Ellenborough, C. J., Scott v. Franklin, 15 East, 436 ; recognized in Graham v. Mulcaster, 4 Bing. 118.[h]

(k) Stonehouse v. De Silva, 3 Camp. 399 ; Hogg v. Bridges, 8 Taunt. 200.[i]

(l) Ray v. Davies, 8 Taunt. 134.[i]

(m) Hancock v. Haywood, 3 T. R. 433 ; Streatfield v. Halliday, 3 T. R. 779.

[e]Eng. Com. Law Rep. 17. [f]Id. 22. [g]Id. 37. [h]Id. 13. [i]Id. 4.

sion of bankrupt, under stat. 6 & 7 Will. 4, c. 14, may maintain an action here to recover a debt contracted with the bankrupt in this country.(*n*)

121. Before assignees have been appointed by the *creditors, [*93] the official assignee is the proper party to sue;(*o*) and, on any new appointment of assignees, the new assignees are to sue;(*p*) and no suit shall abate by the death of an assignee, or the appointment of a new one, but the court, in which the action is depending, may, upon the suggestion of the death or removal, and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former.(*q*)

122. Although an uncertificated bankrupt cannot sue on a contract prior to the bankruptcy,(*r*) even though renounced by the assignees,(*s*) yet, if a chose in action, as a debt or bond, be then assigned by him, and notice of such assignment be given to the debtor or obligor, an action will lie at suit of the bankrupt as trustee for the assignee of such debt or bond, and must be brought in his name, the interest therein not passing to the assignees under the bankruptcy,(*t*) for they do not take *trust estates or property which the bankrupt has equitably assigned before the bankruptcy, but such only as he was beneficially entitled to.(*u*) [*94] Where the defendant gave a warrant of attorney to plaintiff in Ireland to enter up judgment on a bond, and the plaintiff became bankrupt and then signed judgment, and brought an action of debt thereon; it was held that the plaintiff was the proper party to enter up judgment, notwithstanding his bankruptcy; that, in so doing, and in bringing the action, he might be considered as a trustee for the creditors; and that the pendency of another action by the plaintiff's assignee on the same judgment should have been pleaded in abatement.(*x*)

123. With respect to contracts subsequent to the bankruptcy, it has been on several occasions decided, that on these the bankrupt may maintain an action, subject however to the right of the assignees to interfere and set up their claim.(*y*) But where a bankrupt was to have a commission for intro-

(*n*) Fergusson v. Spencer, 2 Scott, M. R. 229.

(*o*) See Page v. Bauer, 4 B. & Ad. 345,[k] recognized Moult v. Massey, 4 B. & Ad. 645;[k] 5 & 5 Vict. c. 122, s. 51.

(*p*) 6 Geo. 4, c. 16, s. 66; and see Bloxam v. Hubbard, 5 East, 407; De Cosson v. Vaughan, 10 East, 61; Aldritt v. Kettridge, 1 Bing. 355.[l]

(*q*) 6 Geo. 4, c. 16, s. 67; 5 & 6 Vict. c. 122, s. 50; Per Tindal, C. J., Bates v. Sturgess, 7 Bing. 586.[m]

(*r*) The bankruptcy of the plaintiff, pending a suit, must be pleaded specially; Chitt. jun., Pleading, 250, n. (*u*); and the assignees must commence a fresh action; Kinnear v. Tarrant, 15 East, 622; Biggs v. Cox, 4 B. & C. 920.[n]

(*s*) Hillary v. Morris, 5 C. & P. 6.[o]

(*t*) Buck v. Lee, 1 A. & E. 804;[p] Dean v. James, Id. 809,[p(a)]; Winch v. Keeley, 1 T. R. 619; Carpenter v. Marnell, 3 B. & P. 40; Dangerfield v. Thomas, 9 A. & E. 292;[q] arg., Kinnear v. Tarrant, 15 East, 626; Leslie v. Guthrie, 1 Bing. N. C. 697.[r]

(*u*) Britten v. Perrott, 2 Cr. & M. 597. 600; Tibbits v. George, 5 A. & E. 107;[s] Chalmers v. Page, 3 B. & Ald. 697;[t] Carvalho v. Burn, 4 B. & Ad. 382,[u] affirmed on error, 1 A. & E. 883,[x] and supra, n. (*t*).

(*x*) Guinness v. Carroll, 1 B. & Ad. 459.[a]

(*y*) Kitchen v. Bartsch, 7 East, 53, and cases there cited; Drayton v. Dale, 2 B. & C. 293;[b] Laroche v. Wakeman, Peake N. P. C. 140; Cumming v. Roebuck, Holt, 172;[c] Hayllar v. Sherwood, 2 Nev. & M. 401; Fyson v. Chambers, 9 M. & W. 460. See the argument in Young v. Rishworth, 8 A. & E. 476,[d] post, s. 124.

[k]Eng. Com. Law Reps. 24. [l]Id. 8. [m]Id. 20. [n]Id. 10. [o]Id. 24. [p]Id. 28. [q]Id. 36. [r]Id. 27. [s]Id. 31. [t]Id. 5. [u]Id. 24. [x]Id. 28. [a]Id. 20. [b]Id. 9. [c]Id. 3. [d]Id. 35.

ducing a purchaser for another trader's business, but became bankrupt after the party was introduced, but before the purchase was completed, and the assignees disclaimed all interest in the contract; it was held, that this disclaimer did not give *the bankrupt any right to sue for the commission; and that though the purchase was completed after the bankruptcy, the right to the commission referred back to the time when the party was introduced.(z) And it seems established, that the bankrupt is entitled to recover for his own work and labour,(a) as well as for materials found, incident and necessary to the labour,(b) or for money lent, if earned by his labour;(c) but where a funiture broker and uncertificated bankrupt was engaged by the defendant to remove his goods, and in this business employed several persons under him, procured and used vans, and supplied packing-cases, repaired furniture, and found materials for that purpose; it was held, that he could not be considered as a man using merely his personal labour, and therefore was not entitled to recover if the assignees thought proper to interfere;(d) and although it was in one case(e) held, that a bankrupt manufacturer employed in carrying on the manufacture for the benefit of the estate, might sue his assignees for work and labour; yet this decision does not appear entitled to any great weight.(f)

[*95]

[*96] 124. Where a bankrupt, who has been bankrupt *before, or compounded with his creditors, or taken the benefit of the insolvent act, does not pay fifteen shillings in the pound, under a second commission, his future property is not protected by his certificate, but vests absolutely in his assignees.(g) In such a case he may however sue in respect of property acquired since the certificate if the assignees do not interfere.(h)

125. The order of the court for the relief of insolvent debtors, under the stat. 1 & 2 Vict. c. 110, s. 37,(i) vests in the provisional assignee, without any conveyance or assignment thereof, all the real and personal estate of the insolvent (except wearing apparel, working tools, and other such necessaries, not exceeding in value 20*l.*); and all his future estate, right, title, interest, and trust, in or to any real and personal estate and effects within this realm or abroad, which he may acquire before becoming entitled to his final discharge in pursuance of the act; and also all debts due or growing due, or to be due to such prisoner before such discharge:(k) and sect. 42 empowers the provisional assignee to sue in his own name, if the court

(z) Hillary v. Morris, 5 C. & P. 6; Winch v. Keeley, 1 T. R. 619.
(a) Chippendale v. Tomlinson, cited 7 East, 58, n. (g); Id. 62.
(b) Silk v. Osborne, 1 Esp. N. P. C. 140. (c) Evans v. Brown, 1 Esp. N. P. C. 170.
(d) Crofton v. Poole, 1 B. & Ad. 568.[e] (e) Coles v. Barrow, 4 Taunt. 754.
(f) Per Best, J., Nias v. Adamson, 3 B. & Ald. 232;[f] and see per Lord Alvanley, C. J., delivering judgment, Hesse v. Stevenson, 3 B. & P. 577, 578.
(g) Stat. 6 Geo. 4, c. 16, s. 127; Robertson v. Score, 3 B. & Ad. 338.[g]
(h) Herbert v. Sayer, 5 Q. B. 965; ante, s. 115, a. See Alexander v. Townley, 6 Scott N. R. 135.
(i) Under this section a debt incurred with the insolvent for goods sold and delivered by him between the date of the vesting order and his final discharge, passes to the assignee. Ford v. Dabbs, 6 Scott, N. R. 193. See Ford v. Dornford, 15 L. J., N. S., Q. B., 172.
(k) See 1 & 2 Vict. c. 110, s. 57, as to property in the possession, order, or disposition of the bankrupt.

[e]Eng. Com. Law Reps. 20. [f]Id. 5. [g]Id. 23.

shall so order, for the recovering, *obtaining, and enforcing of any [*97] estates, debts, effects, or rights of the insolvent; and in the event of resignation, removal, or death, vests in his successor all the estate which had previously been transferred from the insolvent by virtue of the vesting order. By sect. 45, the court may, at any time after the making of the vesting order, appoint assignees in the place of the provisional assignee, in whom the property shall thereupon vest for the benefit of the creditors; and these assignees are empowered to sue by sect. 51; and by sect. 65, the court is empowered to remove the assignees so appointed, and to appoint new assignees in case of death or removal, in whom the insolvent's property shall, in like manner, vest. It is further provided (sect. 53), that no action shall abate by such death or removal, but the court may, upon the suggestion thereof, and of the new appointment, allow the names of the surviving or new assignees to be substituted in the place of the former. Under this statute it has been held that a plea of the plaintiff's discharge ought to aver that the vesting order was made before the commencement of the suit;(*m*) and if it so aver, a replication that after the order the plaintiff's petition was dismissed, and that he was discharged from custody without taking the benefit of the act, will be bad, because in such a case the dismissal of the petition must be taken to have been since action brought, and could not give a right to sue where none existed at the time the action was commenced.(*n*)

126. Under the stat. 5 & 6 Vict. c. 116, amended by *7 & 8 [*98] Vict. c. 96, all the estate and effects of the petitioner become vested in the official assignee upon presentation of the petition as directed by the act; and on the passing of the final order, all the insolvent's estate and effects, present and future, real and personal, become vested in the official and creditors' assignees, without any deed or conveyance; and these assignees are also empowered to sue; and in case of death or removal, new assignees are to be appointed, in whom the estate shall vest, either alone or jointly with the existing assignees.(*o*) By the 16th sect. of the latter act, it is provided that no action shall abate by the death, removal, or new appointment of an assignee; but the court in which the action is pending shall allow the name or names of the surviving or new assignee to be substituted in the place of the former, and such action shall be prosecuted in the name or names of the surviving or new assignee, in the same manner as if he had originally commenced the same.

127. It seems from analogy to the case of a bankrupt, that all rights of action ex contractu, vested in the insolvent previous to the petition and vesting order, are absolutely barred by the assignment;(*p*) with an exception similar to that before stated, that where a bond or debt has been assigned by the insolvent before his insolvency, and notice thereof given to the debtor, any action for the recovery of the debt so assigned, must be brought in

(*m*) Tucker v. Webster, 10 M. & W. 371.
(*n*) Yorston v. Feather, 15 L. J., N. S., Ex. 31.
(*o*) 5 & 6 Vict. c. 116, ss. 1. 7. 9; 7 & 8 Vict. c. 96, ss. 4. 10. 13, 14.
(*p*) See per Littledale, J., Swann v. Sutton, 10 A. & E. 631;[b] ante, s. 122.

[b]Eng. Com. Law Reps. 37.

[*98 a] *the name of the insolvent, as trustee for the assignee.(q) When in such a case there has been an absolute sale and transfer of the debt due to the insolvent before the title of his assignees has accrued, it seems clear that the amount of the price or purchase-money of such debt will be immaterial with respect to the right of the insolvent to sue. But if the purchase of the debt be conditional only at the date of the insolvency, so that in fact the debt due *to* the insolvent stands as a *security* for payment of that due *from* him, then it seems that the assignees will be entitled to sue, whether the debt assigned by the insolvent be greater than, equal to, or less than that due from him; for, if greater, the assignees would have an immediate interest in the sum to be recovered; and if equal to or less than that for which it stands as a security, yet in as much as the debt secured might be diminished by payment before recovery of the debt assigned, and a surplus thus remain applicable to the payment of the insolvent's general creditors, the possibility of such surplus would vest the title to recover the debt in the insolvent's assignees,(r) according to the principle which has been in several cases established, and which is applied by the Court of Exchequer Chamber in Trott v. Smith,(s) where, to a declaration in covenant for default made in payment of a sum of money, the plea alleged that after the

[*98 b] *said breach of covenant the plaintiff became bankrupt, &c.; and Tindal, C. J., with reference to an objection raised, viz., that the cause of action passed to the assignees, says, "the question will be whether there can be any *possible* interest which could pass to the assignees." In Leslie v. Guthrie,(t) and Dangerfield v. Thomas,(u) the attention of the court was not drawn to the circumstance that the equality of the two debts at the time of the bankruptcy, when the title of the assignee accrued, was not averred.(x)

128. Subject, however, to the above remarks, the assignees of the insolvent are the proper parties to sue for property accrued to the insolvent before insolvency, or accruing subsequently, but before his final discharge; and such assignees may interpose and take the benefit of any contract entered into with the insolvent during the last-mentioned period; although, if they do not so interpose, it seems that the insolvent may maintain an action on such contract.(y) If a discharged insolvent be permitted to remain in possession of premises which had become vested in the assignee, and to demise them for a term, it will be no defence to an action by the lessor for rent in arrear, that notice was given to pay such rent to the

(q) Buck v. Lee, 1 A. & E. 804;[i] Tibbits v. George, 5 A. & E. 107;[k] Sims v. Thomas and Strachan v. Thomas, 12 A. & E. 536.[l]

(r) D'Arnay v. Chesneau, 13 M. & W. 796, where the cases are reviewed.

(s) 12 M. & W. 703. See also Carpenter v. Marnell, 3 B. & P. 40; Scott v. Surman, Willes, 400; Parnham v. Hurst, 8 M. & W. 743.

(t) 1 B. N. C. 697. (u) 9 A. & E. 292.[m]

(x) Judgment, 13 M. & W. 810.

(y) Taylor v. Buchanan, 4 B. & C. 419, 420;[n] which was decided under the stat. 1 Geo. 4, c. 119. See Hepper v. Marshal, 2 Bing. 372;[o] Per Abbott, C. J., Lea v. Telfer, 1 C. & P. 146.[p] By 5 & 6 Vict. c. 116, s. 1, the official assignees shall hold and stand possessed of the estate and effects of the insolvent petitioner, *in like manner as* the official assignees of a bankrupt. See Herbert v. Sayer, 5 Q. B. 965.

[i]Eng. Com. Law Reps. 28. [k]Id. 31. [l]Id. 40. [m]Id. 36. [n]Id. 10. [o]Id. 9. [p]Id. 11.

assignee, unless it be shown that a new tenancy *was created between such assignee and the defendant.(s) But the insolvency [*99] of the plaintiff, and assignment to the provisional assignee, constitute a good plea in bar of further maintenance of the action, notwithstanding such assignee, and subsequently the assignees appointed by the court respectively, had notice of the suit, and permitted the same to be continued in the insolvent's name; for all such rights of action in this case, as in that of bankruptcy, are transferred by the assignment.(t)

2.—Executors and Administrators.

When Personal Representatives may sue, ss. 129, 130. Limitations of the Rule, s. 131. How Personal Representatives should sue, s. 132. Rule as to the Joinder of Personal Representatives, and in Case of Survivorship, &c., ss. 133—135. Limited Administrations, s. 136.

129. On the death of a covenantee, his personal representatives(u) are, as a general rule, the parties to sue on all covenants broken in his lifetime; as, on a covenant for quiet enjoyment,(x) to repair,(y) or to discharge the land from incumbrances;(z) and they may sue without being expressly named, for they represent the *person of the testator or intestate.(a) There [*100] is, however, this distinction between a covenant running with the land, and one purely collateral; that in the former case, where the formal breach has been in the ancestor's lifetime, but the substantial damage has taken place since his death, the real, and not the personal representative is the proper plaintiff;(b) whereas, in the case of a covenant not running with the land, and intended not to be limited by the life of the covenantee—as a covenant not to fell trees excepted from the demise—the heir or devisee of the land could not sue for a breach in the lessor's lifetime, and the personal representative is alone entitled so to do.(c) On a covenant made with testator in reference to a chattel, his executors may sue, though not named;(d) but on a covenant in an indenture of apprenticeship it has been held that they cannot sue, the apprentice not being bound to serve the executors of the master.(e)

(s) Partington v. Woodcock, 6 A. & E. 690.[q]
(t) Swann v. Sutton, 10 A & E. 623.[r]
(u) Administrators derive the right of suit from 31 Edw. 3, st. 1, c. 11.
(x) Lucy v. Levington, 2 Lev. 26.
(y) Morley v. Polhill, 2 Ventr. 56, commented on, per Parke, B., 2 Cr. M. & R. 592. 594. (z) Smith v. Simonds, Comberbach, 64.
(a) Per Cur. Lucy v. Levington, 2 Lev. 26; Co. Litt. 209; Litt. s. 339; Com. Dig. Covenant, (B. 1).
(b) Kingdon v. Nottle, 1 M. & S. 355, and 4 M. & S. 53; King v. Jones, 5 Taunt. 518, affirmed on error, 4 M. & S. 188; Raymond v. Fitch, 2 Cr. M. & R. 598, 599; Ricketts v. Weaver, ante, p. 38 *d.*
(c) Per Lord Abinger, C. B., Raymond v. Fitch, 2 Cr. M. & R. 598, 599; Per Parke, J., Carr v. Roberts, 5 B. & Ad. 84.[s]
(d) Per Parke, J., Doe d. Rogers v. Rogers, 2 Nev. & Man. 555.[t]
(e) Baxter v. Burfield, 2 Stra. 1266.

[q] Eng. Com. Law Reps. 33. [r] Id. 37. [s] Id. 27. [t] Id. 28.

130. So, the executor or administrator has a right of suit, not only for the recovery of all debts due to the deceased by specialty or otherwise, but on
[*101] all contracts with him, whether broken in his lifetime or subsequently *to his decease, of which the breach occasions an injury to the personal estate,(g) and which are neither limited to the life of the testator or intestate, nor revoked by his death; as, in the case of a submission to arbitration containing no special clause to the contrary.(h) Therefore it was held, that a vendor having omitted to make out a good title within the stipulated time, and the vendee having died, the executor of the latter might sue for damage incurred by loss of interest on the deposit money, and the expense of investigating the title;(i) and that an administrator might recover against an attorney for his negligence in investigating the title to premises purchased by the intestate, whereby an injury was occasioned to the personal estate.(k) So, debt lies at suit of an executor, for not setting out tithes;(l) against a tenant for double value, for holding over;(m) or for a devastavit by defendant, and administrator, in the lifetime of the testator, and after a judgment recovered by him.(n)

[*102] *131. But an action is not maintainable for a breach of promise of marriage to the deceased, where no special damage is alleged;(o) and generally for injuries affecting the life or health of the deceased—such, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of an attorney, or a coach proprietor—the personal representative cannot maintain an action without stating on the record some damage done to the personal estate of the deceased.(p) But where the breach of a contract relating to the person occasions a damage not to the person only, but also to the personal estate; as, for instance, if in the case of negligent carriage or cure, there was consequential damage, that the testator had expended his money, or had lost the profits of a business or the wages of labour for a time; or if there were a joint contract to carry both the person and the goods, and both were injured; it seems a true proposition, that in these cases the executor might sue for the breach of contract, and recover damages to the extent of the injury to the personal estate.(q)

132. Where the contract declared on was made with the testator or intestate, the personal representative may sue in that character;(r) but if

(g) 2 Cr. M. & R. 596, 597; Per Tindal, C. J., Orme v. Broughton, 10 Bing. 537, 1 Wms. Saund. 112, n. (1). As to rent, see ante, ss. 49, 50. A rent-charge granted pur autre vie goes to the grantee's personal representatives. Stat. 29 Car. 2, c. 3, s. 12; Bearpark v. Hutchinson, 7 Bing. 178;[u] and stat. 1 Vict. c. 26, s. 6.

(h) Cooper v. Johnson, 2 B. & Ald. 394; per Bayley, J., Rhodes v. Haigh, 2 B. & C. 346, 347;[x] M'Dougal v. Robertson, 4 Bing. 435;[y] Tyler v. Jones, 3 B. & C. 144;[z] Clarke v. Crofts, 4 Bing. 143.[b]

(i) Orme v. Broughton, 10 Bing. 533.[c] (k) Knights v. Quarles, 2 B. & B. 102.[d]

(l) Moreron's case, 1 Ventr. 30. (m) 4 Geo. 2, c. 28, s. 1.

(n) Berwick v. Andrews, 2 Ld. Raymond, 971.

(o) Chamberlain v. Williamson, 2 M. & S. 408; Beckham v. Drake, 8 M. & W. 854.*

(p) Per Lord Ellenborough, C. J., delivering the judgment of the court; Chamberlain v. Williamson, 2 M. & S. 415, 416; Knights v. Quarles, 2 B. & B. 104;[d] Beckham v. Drake, 8 M. & W. 854.*

(q) Per Parke, B., delivering the judgment of the Court in Beckham v. Drake, 8 M. & W. 854, 855.*

(r) 1 Wms. Saund. 112, n. (1); Com. Dig. Pleader, (2 D. 1).

[u] Eng. Com. Law Reps. 20. [x] Id. 9. [y] Id. 13. [z] Id. 23. [b] Id. 13. [c] Id. 25. [d] Id. 6.
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made with *himself subsequently to the death of the testator or intestate, and the damages when recovered would be assets; as, where [*103] goods are ordered in the lifetime of the deceased, but delivered subsequently to his death,(s) or where work commenced by an intestate is completed by his administrator,(t) the personal representative may sue either as such or in his individual capacity;(u) and an executor may sue and declare as executor on a bill indorsed to him in that character.(x) But the personal representative cannot, in the same declaration, join a demand in his own right with one in right of his testator or intestate; the rule being, that when the money recovered on each count will be assets, such counts may be joined, but not otherwise.(y)

133. If there are several executors, they have a joint and entire interest in the goods of the testator,(z) and *must therefore sue jointly.(a) And where one only of several executors has proved the will, all [*104] must nevertheless join in an action brought in their representative character; for an executor derives his title, not from the probate, but from the will, and a probate granted to one executor enures to the benefit of all. (b) Even where an executor has renounced probate, he must nevertheless join in suing for a debt due to the testator, for he is still at liberty whenever he pleases to accept of the executorship.(c) And though some of the executors are infants, they must join in an action, and may sue by attorney, for such of the executors as are of full age may appoint an attorney for those who are within age.(d)

133 *a*. Whether or not any particular contract was made with the executors as such or in their individual capacity, will depend of course upon the evidence adduced, and this will determine as to their joinder or non-joinder; for if a contract were entered into with some only of the executors as principals and not as agents for all, they alone should sue and in their individual *character.(e) And although the circumstance of the money [*104*a*] to be recovered on a contract being assets, authorizes the represen-

(s) Marshall v. Broadhurst, 1 Cr. & J. 403. 405, recognized per Parke, B., 2 M. & W. 191; Werner v. Humphreys, 3 Scott, N. R., 226. Payment to the rightful executors is a good defence to an action for goods sold and delivered by an executor *de son tort*. Allen v. Hopkins, 13 M. & W. 94,♦ recognizing Dickenson v. Naul, 4 B. & Ad. 638.

(t) Edwards v. Grace, 2 M. & W. 190.♦

(u) Per Curiam, Marshall v. Broadhurst, 1 Cr. & J. 405, 406; Webster v. Spencer, 3 B. & Ald. 360;[f] Grissell v. Robinson, 3 Bing. N. C. 10;[g] Clarke v. Hougham, 2 B. & C. 149;[h] Aspinall v. Wake, 10 Bing. 51;[i] Lancefield v. Allen, 1 Bligh., N. S., 592.

(x) King v. Thom, 1 T. R. 487, recognized per Tindal, C. J., 10 Bing. 55.[i]

(y) 2 Wms. Saund. 117, d. 5th ed.; Cowell v. Watts, 6 East, 405; cited judgment 12 M. & W. 637;♦ Bennett v. Verdun, 2 Ld. Raym. 841. See 9 & 10 Vict. c. 95, s. 66, in Appendix.

(z) Co. Litt. 209, a., 209, b.

(a) Com. Dig. Administration, (B. 12), Pleader, (2 D. 1); per Park, J., Bassington v. Ault, 2 Bing. 178.[k]

(b) Per Bayley and Holroyd, Js., Webster v. Spencer, 3 B. & Ald. 363. 365;[l] Walters v. Pfeil, 1 Mo. & Malk. 362; Brookes v. Stroud, 1 Salk. 3; 1 Wms. Saund. 291, g.; Per Buller, J., Munt v. Stokes, 4 T. R. 565.

(c) Creswick v. Woodhead, 5 Scott, N. R., 778. 780; 1 Wms. Saund. 291, g.; Wankford v. Wankford, 1 Salk. 307.

(d) Foxwist v. Tremaine, 2 Saund. R. 212; Smith v. Smith, Yelv. 130, supra, note (c); and 2 Bing. 178; Rutland v. Rutland, Cro. Eliz. 377, note, ad finem.

(e) Brassington v. Ault, 2 Bing. 177; Turner v. Hardey, 9 M. & W. 770.

[f]Eng. Com. Law Reps. 5. [g]Id. 32. [h]Id. 9. [i]Id. 25. [k]Id. 9. [l]Id. 5.
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tatives, *if they all contract*, to treat it as such and recover in their representative character; yet it cannot alter the contract itself, and make those parties to it who really are not so.(*f*) Where therefore an action was brought by three plaintiffs as executrix and executors, to recover from the defendant money received by him under a written authority from *two* of the plaintiffs, and it appeared that these two alone had proved the will, the usual power being reserved to the co-executor; it was held that it was a question for the jury whether the contract, which was made with the defendant by the two acting executors, was so made on their own account only, they alone intending to administer the assets without their co-executor, or whether it was made on account of themselves and the other co-executor, or generally on account of the estate, with a view to the interference of the co-executor, in case he should choose to take a part in the management of it. That on the first supposition the action was not maintainable by the three, but that on either of the two latter it was rightly brought.(*g*) So where three executors ordered goods to be sold as the goods of their testator, and afterwards sued for the amount without styling themselves executors, and without joining a fourth executor who was named in the will, the plaintiffs were held entitled to recover; and it was observed by Best, C. J., that [*104 *b*] where *an action is brought expressly by executors, it is clear that all must join, because they derive their interest under the will, not under the probate, and the right to sue is equal in all; but where the management is left with three, and those three enter into a contract, they may sue alone without styling themselves executors.(*h*)

134. It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and this doctrine of relation is available to enable the administrator to obtain the benefit of a contract intermediately made, by suing the contracting party. For instance, A. B. having sent a quantity of goods to his agent abroad for sale, died intestate, and after his death the defendants purchased the goods from the agent, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to the intestate, and sued the defendants in assumpsit for the price of the goods. Held, that the action was maintainable in conformity with the principle above stated, and with the rule of law, that when one means to act as agent for another, a subsequent ratification by that other is equivalent to a prior command.(*i*)

134 *a*. The rule above given as to the joinder of co-executors, applies equally to administrators;(*k*) and, owing to the community of interest, no [*105] action lies by one personal *representative of either description, against his co-representative, the remedy being in equity;(*h*) though where a debtor made his creditor and another co-executors, and the creditor neither proved the will nor acted as executor, it was held, that an action lay

(*f*) Judgment, 12 M. & W. 638. (*g*) Heath v. Chilton, 12 M. & W. 632.
(*h*) Brassington v. Ault, 2 Bing. 177.[m] See Purdon v. Purdon, 10 M. & W. 562.
(*i*) Foster v. Bates, 12 M. & W. 226, recognizing Tharpe v. Stallwood, 6 Scott, N. R. 715. (*k*) Com. Dig. Administration, (B. 12.)
(*h*) Moffatt v. Van Millingen, 2 B. & P. 124, n. (*c*); arg. Rawlinson v. Shaw, 3 T. R. 558.

[m] Eng. Com. Law Reps. 9.

at his suit against the acting executor, for a demand on the testator.(*i*) On the death of a co-executor, the surviving executors must sue without joining the representatives of the deceased executor, their interest having been joint;(*k*) and it seems that a surviving administrator may sue without procuring a new grant of letters of administration.(*l*)

135. The power of an executor being founded upon the special confidence and actual appointment of the deceased, such executor is, therefore, allowed to transmit that power to another, in whom he has equal confidence; and consequently the executor of A.'s executor, if the latter has proved the will,(*m*) is to all intents and purposes the executor and representative of A. himself, and may sue accordingly;(*n*) but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A., for an administrator is merely the officer of the ordinary prescribed to *him by act of Parliament,(*o*) in whom the deceased has reposed no trust at all.(*p*) Therefore on the death of A.'s administrator, or [*106] of A.'s executor, if intestate, or whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary that an administrator de bonis non should be appointed, who is the only legal personal representative of the deceased, and can alone sue in respect of his personal property.(*q*)

136. Where a limited or special administration is granted—as, during the lunacy or minority(*r*) of the executor or next of kin, or during the residence of the executor out of the jurisdiction of the courts,(*s*) or pendente lite—any action in respect of the testator's personalty, must be brought in the name of the party to whom such administration is granted, during the period that it remains in force.(*t*) And where K. being left executor, M., as his attorney, obtained letters of administration to the testator's effects with the will annexed, for the *benefit of K., who never took out probate; and K. died having appointed an executor; and S. there- [*107] upon took out administration with the will of the first testator annexed, and also administration with the will of K. annexed, until K.'s executor should obtain probate: it was held that arrears of interest accruing to the estate of the first testator in K.'s lifetime must be recovered by M.; but that S. might recover such as accrued after he had obtained administration; for M. was the legal representative of the original testator during K.'s life, or, at all events, until he himself took out probate, which he never did; and, after K.'s death, the grant of administration to S. was good.(*u*)

(*i*) Rawlinson v. Shaw, 3 T. R. 557. (*k*) Ante, ss. 9. 23.
(*l*) Per Sir J. Strange, M. R., Jacomb v. Harwood, 2 Ves. 268.
(*m*) Hayton v. Wolfe, Cro. Jac. 614; Per Holt, C. J., Wankford v. Wankford, 1 Salk. 308, 309. (*n*) Stat. 25 Edw. 3, st. 5, c. 5.
(*o*) Stat. 31 Edw. 3, st. 1, c. 11. (*p*) 2 Bla. Com. 506.
(*q*) 2 Bla. Com. 506; Elliott v. Kemp, 7 M. & W. 306. In assumpsit by an administrator de bonis non, the promise may be laid to have been made to the first administrator. Hirst v. Smith, 7 T. R. 182. See Catherwood v. Chabaud, 1 B. & C. 150.[a]
(*r*) Stat. 38 Geo. 3, c. 87, ss. 6, 7; Freke v. Thomas, 1 Salk. 39.
(*s*) Stat. 38 Geo. 3, c. 87, s. 1.
(*t*) See Slater v. May, 2 Lord Raymond, 1071, and cases there cited; Taynton v. Hannay, 3 B. & P. 26, where it was held, (diss. Lord Alvanley, C. J.), that an administration durante absentiâ of an executor was not rendered void, but only voidable, by the death of such executor. (*u*) Suwerkrop v. Day, 8 A. & E. 624. 632.[c]

[a]Eng. Com. Law Reps. 8. [c]Id. 35.

[*106]

PART II.

DEFENDANTS IN ACTIONS EX CONTRACTU.

CHAPTER I.

GENERAL RULES.

Distinction between the legal and equitable Interest, ss. 137, 138. Who should be sued on a Contract under Seal, ss. 139, 140. Joinder of Parties liable on a Contract under Seal, ss. 141—144. Who should be sued after Assignment of Land, ss. 145—147. After Death of the Covenantor or Obligor, ss. 148—152. Who should be sued on a Simple Contract, s. 153. Joinder of Parties liable on a Simple Contract, ss. 154—159. Assignment of Liability on a Simple Contract, s. 160.

137. COURTS of equity, generally speaking, require that all persons legally or beneficially interested in the subject-matter of a suit should be made parties to it; but courts of law consider only the parties directly and immediately interested, and whose interests are of a strictly legal nature.(*a*) Hence, as we have already seen, a trustee cannot be sued at law by his cestui que trust,(*b*) unless after giving a written acknowledgment that he holds a specific sum for the latter,(*c*) or, after *the trust is ended, [*109] and the trustee has stated an account or has admitted that he holds a sum in his hands payable to the cestui que trust absolutely, in which case he becomes, with respect to that sum, a debtor not properly a trustee; and an action for money had and received will be maintainable against him; but, in general, where money has been originally received by a party as trustee, the only remedy available to the cestui que trust whilst the trust continues open, is by bill in equity.(*c*)

138. There are, however, some cases in which courts of law will take notice of trusts; as, for instance, where a bankrupt is a mere trustee,(*d*) and they will, when requisite, recognize the difference between a legal and a beneficial interest;(*e*) but, as a general rule, matter of equity affords no defence against a claim by the party legally entitled.(*f*)

139. The party to be sued on an instrument under seal, as on an indenture or bond, is pointed out by the express terms of the deed; and, if a man

(*a*) Story, Eq. Pl. ss. 76, 77.

(*b*) Ante, s. 2, Allen v. Imlett, Holt, N. P. C. 641.[p] See Allen v. Impett, 8 Taunt. 263;[q] Mileham v. Eicke, 3 M. & W. 407.[♦] (*c*) Remon v. Hayward, 2 A. & E. 666.[r]

(*c*) Bartlett v. Dimond, 14 M. & W. 47. 56,[♦] where it is said that "the case of Allen v. Impett, (ante (*b*)), seems at least questionable." Pardoe v. Price, 13 M. & W. 282;[♦] Roper v. Holland, 3 A. & E. 99.[s] See also Edwards v. Bates, 8 Scott N. R. 406; Case v. Roberts, Holt, N. P. C. 500; Randoll v. Bell, 1 M. & S. 714.

(*d*) Forster v. Wilson, 12 M. & W. 191;[♦] per Parke, B., 2 Cr. & M. 602.

(*e*) Britten v. Perrott, 2 Cr. & M. 602.

(*f*) Tucker v. Tucker, 4 B. & Ad 745. 751,[t] per Littledale, J., and Parke, J., denying the authority of Bottomley v. Brook, cited, 1 T. R. 621, and Rudge v. Birch, cited, Id. 622.

[p]Eng. Com. Law Reps. 3. [q]Id. 4. [r]Id. 29. [s]Id. 30. [t]Id. 24.
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covenants for himself and his heirs and, under his own hand and seal, for the act of another, he shall be bound by his covenant, though he describe himself in the deed as *covenanting for and on the part and behalf of such other person.(g) [*110]

140. It seems clear that signing is not essential to the validity of a deed at *common* law, and that it is, therefore, only requisite when expressly required by statute;(h) but whether it is necessary, by the Statute of Frauds, that a lease under seal should also be signed is a question which remains yet undecided;(i) and, although one, who is neither expressed to be a party to a deed inter partes, nor executes it, cannot be sued thereon,(k) yet one, who is not a party to a deed, may covenant with another who is a party, and thereby oblige himself by sealing the deed;(l) and one, who executes a deed, has been held liable, although neither a party to it nor even expressly named therein.(m) So, if a lease(n) be made to A. and B. by indenture, which A. executes, and B. agrees *to the lease and enters, but does not seal, it has been laid down that the latter will be liable for breach of covenants contained in it;(p) but this position does not seem warranted by the authorities cited in support of it.(q) However, covenant lies on letters-patent, though there is no counterpart executed by the lessee, who is to be charged,(r) for when he takes by the patent he consents to the covenants therein contained. [*111]

141. Where a specialty contract or obligation is entered into by several, it must be either joint, joint and several, or several.(s) If expressly joint, all parties chargeable must be made defendants in an action for the breach of such contract;(t) but where the contract is in terms joint and several, the covenantee may elect to sue either one or all of the covenantors, notwithstanding their legal interest in the subject-matter of the covenant be joint.(u)

(g) Appleton v. Binks, 5 East, 148. See Wilks v. Back, 2 East, 142; Frontin v. Small, 2 Lord Raym. 1418; White v. Cuyler, 6 T. R. 176.

(h) Bac. Ab. Obligations, (C.); Com. Dig. Faits, (C. 1); Finch's Law, 108; 2 Bla. Com. 305, 306. See per Tindal, C. J., Toms v. Cuming, 14 L. J., N. S., C. P. 68; Hyde v. Johnson, 2 B. N. C. 776;[u] Pitts v. Beckett, 13 M. & W. 743; Clark v. Alexander, 8 Scott, N. R. 163.

(i) Cooch v. Goodman, 2 Q. B. 580,[x] cited per Patteson, J., 4 Q. B. 376.[y] Aveline v. Whisson, 4 M. & Gr. 801.[z]

(k) Per Tindal, C. J., delivering the judgment of the court, Bushell v. Beavan, 1 Bing. N. C. 120.[b]

(l) Per Holt, C. J., Salter v. Kidgley, Carth. 76, 77.

(m) Salter v. Kidgley, Carth. 76; Nurse v. Frampton, 1 Lord Raym. 28; S. C. 1 Salk. 214; but in the case of an indenture, see per Parke, B., 9 M. & W. 95; Skidmore v. Vaudstevan, Cro. Eliz. 56; and see Co. Litt. 230, b.

(n) See per Coleridge, J., Doe d. Marlow v. Wiggins, 4 Q. B. 378,[y] as to a lease not signed by both parties.

(p) Co. Litt. 231, a.; and Mr. Butler's note, Id. 230, b., n. (1); Per Abbott, C. J., Burnett v. Lynch, 5 B. & C. 602.[c]

(q) See this subject discussed at length, Platt on Covenants, 10 et seq.

(r) Brett v. Cumberland, Cro. Jac. 399. 521; Ewre v. Strickland, Id. 240; per Twisden, J., Wootton v. Hele, 1 Mod. 291, 292. See Platt on Cov. 10.

(s) See Platt on Cov. 117—121.

(t) Cabell v. Vaughan, 1 Wms. Saund. 291, b. n. (4); and as to the mode of taking advantage of the non-joinder of a necessary defendant, Id. et seq. Eccleston v. Clipsham, Id. 154, n. (1); and if one joint covenantor does not execute, see Bidwell v. Lethbridge, 1 Barnard, 235.

(u) Eccleston v. Clipsham, 1 Wms. Saund. 154, n. (1). See the rule as to joint and several covenantees, ante, s. 7.

[u] Eng. Com. Law Reps. 29. [x] Id. 2. [y] Id. 45. [z] Id. 43. [b] Id. 27. [c] Id. 12.

[*112] 142. Therefore, if A. lets land to B. and C., who *covenant jointly and severally with the lessor for payment of rent, or the like, the latter may bring an action against either of the covenantors; for they are sureties for the due performance of the covenants, and it is as competent for each of them to covenant for the other, as for a stranger to covenant for both, which is an usual thing:(x) and so, if two covenant for themselves, and for each other, to receive and duly pay over to plaintiff the rents of his estate.(y) Where defendant and an infant granted an annuity, and jointly and severally covenanted for its due payment, it was held, that the infancy of the grantor did not exonerate defendant from his separate contract, although, by by stat. 53 Geo. 3, c. 141, s. 8, the indenture was void as to the infant.(z)

143. But on a joint and several covenant(a) or bond, the plaintiff must elect to proceed either as if the contract or obligatory part of the instrument were joint, or as if it were several; so that the parties chargeable must be sued jointly or individually;(b) and in the former case, the personal representatives of a deceased contracting party must not be joined, nor need the [*113] survivors be declared against as such.(c) And there is this *distinction between a joint and a joint and several bond; that if two are jointly bound, and one dies, the survivor must be sued, and an action cannot be maintained against the personal representative of the deceased; but if bound jointly and severally, it is otherwise, for the obligee may sue either the executor or the survivor.(d) But the discharge of one obligor, or satisfaction made by him, discharges his co-obligor, for there is but one duty extending to both;(e) and if one of three joint and several covenantors become bankrupt, and obtain his certificate, the covenantee may proceed against the other two.(g)

144. If the contract be several in its terms, each covenantor or obligor is, of course, separately liable, and must be separately sued; for at law, as well as (generally speaking) in equity, the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situations.(h) And where an action [*114] was brought against two parties on an implied covenant arising *out of a demise, but it appeared that in point of law one of the parties

(x) Enys v. Donnithorne, 2 Burr. 1190. 1196.
(y) Lilly v. Hodges, 8 Mod. 166; S. C., Stra. 553.
(z) Gillow v. Lillie, 1 Bing. N. C. 695.[d]
(a) See Platt on Covenants, 134, 135.
(b) Cabell v. Vaughan, 1 Wms. Saund. 291, e.; Com. Dig. Obligation, (G.); Bac. Ab. Obligations, (D. 4), Covenant, (D.); Per Buller, J., Streatfield v. Halliday, 3 T. R. 782. As to staying proceedings in actions against several defendants, see Chitt. Arch. Pr. 7th ed. 993; Anderson v. Towgood, 1 A. & E., N. S., 245.[e]
(c) Bac Ab. Obligations, (D. 4); 1 Wms. Saund, 153, n. (1); Enys v. Donnithorne, 2 Burr. 1196; Whelpdale's case, 5 Rep. 119; and see this subject fully considered, 1 Wms. Saund. 291 a, n. (4).
(d) Towers v. Moor, 2 Vern. 99: May v. Woodward, Freem. 248; Enys v. Donnithorne, 3 Burr. 1190.
(e) Per Eyre, C. J., Cheetham v. Ward, 1 B. & P. 633; Per Lord Denman, C. J., Nicholson v. Revill, 4 A. & E. 682, 683;[f] 2 Wms. Saund. 48, a, note; Brooks v. Stuart, 9 A. & E. 854.[g] As to whether a bond be joint or several, see Collins v. Prosser, 1 B. & C. 682;[h] Robinson v. Walker, 1 Salk. 393; Sayer v. Clayton, 1 Lutw. 695.
(g) Baxter v. Nichols, 4 Taunt. 90; post, s. 156.
(h) Birkley v. Presgrave, 1 East, 226, 227.

[d]Eng. Com. Law Reps. 27. [e]Id. 41. [f]Id. 31. [g]Id. 36. [h]Id. 8.

demised, and the other who had only an equitable interest, confirmed; it was held, that the party making the demise, and legally entitled, should have been sued alone.(*i*)

145. The weight of authority seems to shew, that the assignee of land in other cases than between landlord and tenant, is not, even though expressly named, bound by the covenants entered into by the assignor;(*k*) and the reason alleged for this rule is, "the inconvenience which would result if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. The difference is obviously very great between such a case as this and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts: the estate is not out of them, though the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property, that certain things should be reserved to the reversioner all the while the term continues; it is only something taken out of the demise; some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them *before the demise, and what will again be wholly used by them when that demise is at an end.(*l*) [*115]

146. Where lands were conveyed to A. in fee, to the use of B.'s appointee, and in default of appointment to the use of B. in fee, who covenanted for himself, his heirs and assigns, to pay a certain fee-farm rent to the plaintiffs, and A. and B. conveyed to C., by way of appointment: it was held, that defendant, the heir, devisee, and executor of C., was not liable in covenant as B.'s assignee; for C. came in under the original conveyance which created the power of appointment; and a person taking under a power, takes under him who created the power, and not under him who executes it.(*m*)

147. From the rule just stated,(*n*) it should seem, that if the grantor of a rent-charge covenant for due payment of the same, with the usual clause of re-entry in case of default, and after assignment of the land the rent fall in arrear, the assignee and terretenant would not be liable in an action of covenant; although, of course, the grantee of the rent has his remedy by distress against the land.(*o*)

*148. Where a person by bond, covenant (whether real or personal,) or other specialty, binds himself and his heirs, the heir(*p*) and devisee [*116]

(*i*) Smith v. Pocklington, 1 Cr. & J. 445.

(*k*) See this subject discussed at length, and the authorities cited and considered, Smith's Leading Cases, Vol. I., note to Spencer's case; Mayor of Carlisle v. Blamire, 8 East, 487.

(*l*) Per Lord Brougham, C., in Keppel v. Bailey, 2 Myl. & K. 517.

(*m*) Roach v. Wadham, 6 East, 289; Doe d. Wigan v. Jones, 10 B. & C. 459. 468,[1] where it was held that an elegit issued by a judgment creditor, was defeated by a deed of appointment executed subsequently to the judgment in pursuance of a power created by a conveyance anterior thereto.

(*n*) Sect. 145.

(*o*) Brewster v. Kitchell, 12 Mod. 166, and the remarks on this case in Smith's Leading Cases, Vol. I., note to Spencer's case.

(*p*) When the heir is also devisee he now takes in the latter character, 3 & 4 W. 4, c. 106, s. 3.

[1]Eng. Com. Law Reps. 21.

are each liable for the default of the ancestor or testator, to the extent of assets, freehold and copyhold, taken by descent or devise, and must be jointly sued; although if there be no heir, the devisee may now be sued alone,(q) though he could not have been so prior to the recent stat. 11 Geo. 4 & 1 Will. 4, c. 47.(r) If the heir be not named in the ancestor's bond, he will not be liable even on his express promise to pay in consideration of forbearance; but, if named, it seems he would in this case be liable, although without assets by descent.(s)

149. This liability of the heir existed at common law; but the devisee was first rendered liable in an action of debt by stat. 3 & 4 Will. & M. c. 114(t) and now in an action of debt or covenant by statute 11 Geo. 4 & 1 Will. 4, c. 47, repealing the former enactment. It does not appear, however, that this statute gives any remedy against the devisee, where the damages are unliquidated, and the breach of covenant subsequent to the death of the covenantor.(u) In case of the death of the original devisee before [*117] action brought, his devisees may be sued jointly with the heir.(x)

150. In order then to render the heir liable on the ancestor's specialty, it is necessary, first, that he be expressly named in the bond or covenant; whence it follows, that he will not in general be liable on an implied covenant;(y) and, secondly, that he have assets by descent from the covenantor; for though the covenant descends to the heir, whether he inherits any estate or not, it lies dormant, and is not compulsory until he has assets by descent.(z) However, a mere equity of redemption is not assets at law, to charge the heir or devisee; but in equity it is so;(a) and now a debtor's real estate not charged with or devised subject to the payment of his debts, is assets to be administered by courts of equity for that purpose.(b)

151. Where lands are devised subject to and charged with the payment of a legacy, it seems doubtful whether an action lies against the devisee for the recovery of the legacy;(c) perhaps if a testator left an estate in fee to A., directing him to pay a sum of money to B., after A. had [*118] accepted the estate, an action of debt might lie against him at the suit of B., founded upon the duty created by the testator, of paying him the sum directed.(d) But at all events such an action could not be sustained against parties holding a term by way of mortgage under the devisee.(e)

(q) 11 Geo. 4 & 1 Will. 4, c. 47; 2 Bla. Com. 16th ed, 304, n. (4); 3 Id. 158, n. (10). See the form, Chitt. jun. Pl. 467. 485, n. (a).

(r) Hunting v. Sheldrake, 9 M. & W. 256.♦

(s) Barber v. Fox, 2 Wms. Saund. 136, 137 b.; Co. Litt. 209, a.

(t) See Farley v. Briant, 3 A. & E. 847. 850. 859;[k] Dyke v. Sweeting, Willes, 585, 587; Per Grose, J., Wilson v. Kimbley, 7 East, 135; Platt on Covenants, 305. 452.[k]

(u) Farley v. Briant, 3 A. & E. 839,[k] which, however, was decided under the previous stat. 3 & 4 Will. & M. c. 14; Chitt. Arch. Pr. 7th ed. 884, (a); Chitt. jun. Pl. 467, (e), and see the declaration in covenant against heir and devisee, Id. 467.

(x) Stat. 11 Geo. 4 & 1 Will. 4, c. 47, s. 3. (y) Platt on Covenants, 449.

(z) 2 Bla. Com. 244.

(a) Jeffreson v. Morton, 2 Wms. Saund. 7, n. (4); Bac. Ab. Heir, (I). See Mayor of Carlisle v. Blamire, 8 East, 487. (b) Stat. 3 & 4 Will. 4, c. 104.

(c) See Lord Holt's dictum, Ewer v. Jones, 2 Salk. 415, S. C. 2 Lord Raymond, 937; commented on and qualified in Braithwaite v. Skinner, 5 M. & W. 313.♦

(d) Per Parke, B., Braithwaite v. Skinner, 5 M. & W. 325.♦

(e) Braithwaite v. Skinner, 5 M. & W. 313.♦

[k] Eng. Com. Law Reps. 30. [l] Id. 14. ♦ Reprinted at $2.50 per vol.

152. As regards the personal representatives of the obligor or covenantor, they are liable to the extent of assets, although not named, except on a covenant which from its nature must be performed by the covenantor, and determines by his death ;(*g*) and where the real and personal representatives are alike liable, the plaintiff may elect to sue either(*h*) or both separately.(*i*) It may be observed too that an express promise will not support an action against the personal representatives for a legacy or for a distributive share of the personal estate.(*k*)

153. In suing on a simple contract, the party to be made defendant is he by whom it was concluded, and who is rendered liable either by the express and avowed *terms of the contract,(*l*) or by those implied terms which reason and justice dictate, and which the law presumes that every man undertakes to perform;(*m*) as, where money is received, which ex æquo et bono the party receiving ought to refund, either because it was paid by mistake or upon a consideration which happened to fail, or because obtained through imposition, express or implied, or through extortion, oppression, or an undue advantage taken of the plaintiff's situation.(*n*) [*119]

154. Where several persons stipulate for the performance of a particular act, the law implies that they are bound jointly and not severally; and there must be express words in order to create a several responsibility.(*o*) It is also clear, that on a written agreement, the plaintiff can only sue the defendants in the manner in which the latter have made themselves liable ;(*p*) and, if there be *any difficulty in determining the proper parties to be sued, such difficulty must arise from an ambiguity in the particular instrument on which the liability is sought to be established.(*q*) [*120]

155. On a verbal contract, however, it is often a question of great nicety, whether the particular liability be joint or several, for this depends on the evidence adduced, the effect of which must be left to the consideration of the jury.(*r*) It is not enough to show that credit was given to several jointly, without some proof of their contracting jointly, either expressly or

(*g*) See further as to the liability of executors and administrators, post, s. 175; Hyde v. Dean of Windsor, Cro. Eliz. 353; Co. Litt. 209, a.; 3 Bla. Com. 16th ed. 158, n. (10).

(*h*) Davies v. Churchman, 3 Lev. 189; Davy v. Pepys, Plowd. 439 b.

(*i*) Haight v. Langham, 3 Lev. 303.

(*k*) Deeks v. Strutt, 5 T. R. 690; Jones v. Tanner, 7 B. & C. 542. 544;[l] and cases cited in Braithwaite v. Skinner, 5 M. & W. 313,[o] and Id., per Parke, B., 325.

(*l*) See Webb v. Rhodes, 3 Bing. N. C. 732.[m]

(*m*) 2 Bla. Com. 443; Per Lord Ellenborough, C. J., Annett v. Carstairs, 3 Camp. 356. See Chitt. jun. Contr. 3rd ed. 19—27; Id. 541, 542; Per Lord Loughborough, C. J., Jenkins v. Tucker, 1 H. Bla. 93; Exall v. Partridge, 8 T. R. 308; Alexander v. Vane, 1 M. & W. 511; Per Lord Kenyon, C. J., Child v. Morley, 8 T. R. 613, 614.

(*n*) Per Ld. Mansfield, C. J., delivering the judgment of the court, Moses v. Macfarlane, 2 Burr. 1012.

(*o*) Chitt. Contr. 3rd ed. 99; Forster v. Taylor, 3 Camp. 49, 51, n.; Hussey v. Crickitt, Id. 168; Wathen v. Sandys, 2 Camp. 640; City of London Gas Company v. Nicholls, 2 C. & P. 365.[n] The costs of an election petition, under 9 Geo. 4, c. 22, ss. 57. 63, may be recovered against one of several petitioners, Gurney v. Gordon, (in error,) 2 Cr. & J. 614; Fector v. Beacon, 5 Bing. N. C. 302.

(*p*) Per Lord Denman, C. J., Lee v. Nixon, 1 A. & E. 207, 208.[o]

(*q*) Collins v. Prosser, 1 B. & C. 682; Lee v. Nixon, 1 A. & E. 201.[p] As to joint and several promissory notes, 1 Selw. N. P. 10th ed. 385; Clark v. Blackstock, Holt, N. P. C. 474;[r] Lord Galway v. Matthew, 1 Camp. 403; March v. Ward, Peake, N. P. C. 130.

(*r*) See Kirby v. Banister, 5 B. & Ad. 1069.[s]

[l]Eng. Com. Law Reps. 14. [m]Id. 32. [n]Id. 14. [o]Id. 28. [p]Id. 28. [r]Id. 3. [s]Id. 27.

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impliedly,(*s*) or that the work done was for their joint benefit;(*t*) and a plea in abatement for non-joinder of a co-contractor, was held good, where the evidence in support of the declaration only established contracts by all the defendants jointly with another party, and by several defendants both with and without such other party;(*u*) but the plea in abatement must be confined to those parts of the declaration to which it is applicable, and must not be pleaded generally, unless the objection of non-joinder hold equally as to [*121] all causes of action *included therein against the defendants on the record.(*x*)

156. Where one of several joint contractors has been discharged from liability by bankruptcy and certificate, or under an insolvent act, such discharge does not operate as a discharge of those who were jointly bound, or had jointly contracted with him;(*y*) and may now be replied to a plea in abatement of non-joinder;(*z*) so, a co-defendant discharged from liability by the Statute of Limitations, may be omitted;(*a*) and surviving joint contractors need not be declared against as such;(*b*) nor must the representatives of the deceased be joined as defendants.(*c*) A judgment recovered against one of two joint contractors is pleadable in bar in an action against the other.(*d*) Though a plea in abatement has been held bad which stated that the debt sued for was contracted by defendant jointly with one A. B., and [*122] *that an action for recovery of the same debt is pending against the said A. B.(*e*)

157. On a joint and several contract the plaintiff must sue all the contracting parties jointly, or any one individually; and either course of proceeding may be adopted at his election;(*f*) but the debtee's discharge of one joint and several debtor, as in the case of a joint and several promissory note, is a discharge of all.(*g*) And it must be observed, that the introduction into a contract of terms expressly joint, will entail a joint liability, though the parties would otherwise have been only severally liable; as,

(*s*) Eaden v. Titchmarsh, 1 A. & E. 691. 694;[r] Malkin v. Vickerstaff, 3 B. & Ald. 89;[t] Lanchester v. Tricker, 1 Bing. 201;[u] Northwaite v. Bennett, 2 Cr. & M. 316; Massey v. Knowles, 2 Stark. R. 65;[x] Leigh v. Taylor, 7 B. & C. 491;[y] post, s. 184.

(*t*) Hellings v. Gregory, 1 C. & P. 627.[s]

(*u*) Hill v. White, 6 Bing. N. C. 23.[b]

(*x*) Hill v. White, 6 Bing. N. C. 26.[c] As to pleading non-joinder in abatement, see judgment, King v. Hoare, 13 M. & W. 505;[♦] Bleakley v. Jay, 13 M. & W. 464;[v] Davies v. Thomson, 14 M. & W. 161.[♦] Cocks v. Brewer, 11 M. & W. 51.[♦] Bull v. Taylor, Q. B., Trin. T., June 13, 1846. As to misjoinder see Robeson v. Ganderton, 9 C. & P. 476.[d] As to the effect of paying money into Court on a joint contract, see Archer v. English, 2 Scott, N. R. 156; Charles v. Branker, 12 M. & W. 743.[♦]

(*y*) 5 & 6 Vict. c. 122, s. 37; 6 Geo. 4, c. 16, s. 121.

(*z*) 3 & 4 Will. 4, c. 42, s. 9. (*a*) 9 Geo. 4. c. 14, s. 2.

(*b*) Richards v. Heather, 1 B. & Ald. 29; Per Grose, J., Smith v. Barrow, 2 T. R. 479. See per Lord Mansfield, C. J., Rice v. Shute, 5 Burr. 2613; 1 Wms. Saund. 153, n. (1); Hawkins v. Ramsbottom, 6 Taunt. 179; Chitt. jun. Pleading, 152, and n. (d).

(*c*) Calder v. Rutherford, 3 B. & B. 302;[e] *supra*, n. (d).

(*d*) King v. Hoare, 13 M. & W. 494;[♦] *secus* where the debt is joint and several.

(*e*) Henry v. Goldney, 10 Jur. 437.

(*f*) Hammond, Parties to Actions, 47. 229; Per Lord Denman, C. J., Lee v. Nixon, 1 A. & E. 207, 208;[f] ante, s. 141.

(*g*) Payment by one co-contractor is the payment of each; Beaumont v. Greathead, 15 L. J., N. S., C. P., 130; Nicholson v. Revill, 4 A. & E. 675;[g] Per Eyre, C. J., Cheetham v. Ward, 1 B. & P. 633. See Bain v. Cooper, 9 M. & W. 701.[♦]

[r]Eng. Com. Law Reps. 28. [t]Id. 5. [u]Id. 8. [x]Id. 14. [y]Id. [s]Id. 11. [b]Id. 37. [c]Id. 37. [d]Id. 38. [e]Id. 7. [f]Id. 28. [g]Id. 31. [♦]Reprinted at $2.50 per vol.

where two promised jointly and severally to perform an award; and the arbitrator awarded each of the two to pay a certain sum to the plaintiff: it was held that the latter was entitled to sue both jointly for the entire amount of the sum awarded.(*h*) On the other hand, where words of severalty are introduced into the contract or agreement, the parties thereby incurring liability must have the benefit and protection resulting from them.(*i*)

158. Where one party becomes surety for another, he must be declared against as such, and not jointly with his principal; as in the case of a bill of exchange drawn on and accepted by A., and also accepted by B., *where A. must be sued as acceptor, but B.'s undertaking is clearly [*123] collateral,(*n*) there being a manifest distinction between a collateral engagement for another and an original and direct agreement for the party's own act.(*o*) Where, therefore, from the particular facts in evidence, it appears that A. supplied goods to B., on the credit of C., A.'s remedy is against C., who may subsequently recover over against B.;(*p*) but if the understanding was that B. should pay, C. undertaking that such payment should be duly made; in this case, C.'s security is collateral and within the Statute of Frauds, the question to whom credit was given being for the jury.(*q*)

159. Whether several may be joined or not as defendants in debt on a penal statute, will depend on whether the offence is by the provisions of the statute considered to be joint or several; as if it provide that one penalty shall be paid by several offenders,(*r*) or by each individually;(*s*) and in the absence of any necessary inference from the particular enactment, the above question must be determined by the nature of the offence in legal contemplation.(*t*)

*160. We have already seen(*u*) that certain instruments are [*124] negotiable for mercantile purposes, and that under particular circumstances the liability on a parol contract is transferable; thus, where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from A. to B., and that a larger sum is due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B. the amount owing to him by A.; an action will lie by B. against C.(*x*) To this we may add, that where money is remitted to one party for the benefit of a third, the latter cannot maintain an action in respect thereof against the former, unless something has been done by the remittee amounting to an assent or agreement on his part to hold the sum remitted for the

(*h*) Mansell v. Burredge, 7 T. R. 352, cited 2 Wms. Saund. 61 h, n. (2).
(*i*) Lee v. Nixon, 1 A. & E. 201.[s]
(*n*) Jackson v. Hudson, 2 Camp. 447; Ferris v. Bond, 4 B. & Ald. 679.[h]
(*o*) Chitt. Contr. 3rd ed. 499. (*p*) Chitt. Contr. 3rd ed. 597.
(*q*) Simpson v. Penton, 2 Cr. & M. 430, and cases there cited; Birkmyr v. Darnell, 1 Salk. 27, 2 Lord Raymond, 1083, S. C. Chitt. Contr. 3rd ed. 508—517; Sweeting v. Asplin, 7 M. & W. 165.*
(*r*) Hardyman v. Whitaker, 2 East, 573. 574.
(*s*) King v. Share, 11 Law Journ., N. S., Q. B. 163; Per Lord Kenyon, C. J., Peshall v. Layton, 2 T. R. 713. Reg. v. Dean, 12 M. & W. 39.*
(*t*) Barnard v. Gostling, 2 East, 569, affirmed in error, 1 B. & P., N. R. 245; Bristow v. James, 7 T. R. 257. (*u*) Ante, s. 27.
(*x*) Per Lord Tenterden, C. J., Fairlie v. Denton, 8 B. & C. 400;[i] Wilson v. Coupland, 5 B. & Ald. 228;[k] Hodgson v. Anderson, 3 B. & C. 842;[l] Per Holroyd, J., Wharton v Walker, 4 B. & C. 166; Per Buller, J., Tatlock v. Harris, 3 T. R. 180.

[s]Eng. Com. Law Reps. 28. [h]Id. 6. [i]Id. 15. [k]Id. 7. [l]Id. 10.
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purpose indicated by his principal; and an express repudiation by him is unnecessary, for his privity to the arrangement will not be presumed.(y) Of course the remittee's authority may be revoked before the remittance has been applied pursuant to the original instructions of the principal, and in the absence of any pledge that it will be so applied; in which case the [*125] remittee holds the money to *the use of the principal, and will be liable accordingly.(z) But where a party engages himself to appropriate the proceeds of goods consigned to and sold by him, by direction of the owner, to the payment of certain acceptances held by a third person, unless previously honoured, none of the parties are at liberty, without the assent of all, to alter that arrangement.(a)

[*126]

CHAPTER II.

1. LANDLORD AND TENANT, ss. 161—181.
2. PRINCIPAL AND AGENT, ss. 182—206.
3. PARTNERS, CORPORATIONS, COMPANIES, ss. 207—217.

1. Landlord and Tenant.

Liability of Landlord, s. 161. Where several Parties are interested in the demised Premises, ss. 162, 163. Liability of Parties after assignment of the Reversion, ss. 164—166. Liability of the Tenant, ss. 167, 168. Liability of parties after Assignment of the Term, ss. 169—175. After Death of Lessee or Assignee, ss. 176—180. In case of an underlease, s. 181.

161. Where a demise is by deed, and the parties to such demise are single, no difficulty can arise in determining the party to be sued for breach of covenant, such party being liable in respect of the privity of contract, whether the covenant be such as runs with the land, or is merely of a personal nature.(a) In the absence of any express contract between the parties, an implied contract may also be inferred from the fact of occupation as tenant; and such occupation may be constructive as well as actual, it being a general rule, that the common count for use and occupation applies wherever the defendant uses or enjoys premises as a tenant by the plaintiff's permission.(b) Therefore, if A. agree to let lands to B., who permits [*127] C. to occupy them, A. may *recover the rent in an action against B. for use and occupation.(c)

162. Where parties have a joint legal interest in land demised, as where

(y) Wedlake v. Hurley, 1 Cr. & J. 83; Williams v. Everett, 14 East, 582; Per Bolland, B., Bruid v. Hampshire, 1 M. & W. 373;[p] Stewart v. Fry, 7 Taunt. 339.[m] See also Israel v. Douglas, 1 H. Bla. 239, and the remarks on this case, and as to when a special count should be used, Chitt. Contr. 3rd ed. 615; and see 14 East, 587, n. (a).

(z) Gibson v. Minet, 2 Bing. 7;[n] Hodgson v. Anderson, 3 B. & C. 842. 854,[o] recognised per Alderson, J., Crowfoot v. Gurney, 9 Bing. 376, 377.[p]

(a) Walker v. Rostron, 9 M. & W. 411.[q]

(a) Woodfall, L. & T. 4th ed. 596, 597. (b) Id. 640.

(c) Bull v. Sibbs, 8 T. R. 327.

[m] Eng. Com. Law Reps. 2. [n] Id. 9. [o] Id. 10. [p] Id. 23. [q] Reprinted at $2.50 per vol.

they are joint tenants,(d) heirs by gavelkind,(e) or, it seems, co-parceners,(g) they must be jointly sued for breach of contract towards their tenant. If tenants in common join in a lease, it operates as the several leases of their several interests;(h) and although tenants in common cannot make a joint lease of the whole of their estate,(i) yet if they join in a lease for years, by indenture, of their several lands, it is the lease of each for their respective parts, and the cross-confirmation of each for the part of the other; and, of course, on their joint covenants in such a lease they must be jointly sued.(k)

163. It is not intended to enumerate the different express covenants which have been held to entail a joint or several liability;(l) but we may observe, that the general words of the first covenant in a lease must be construed to extend to the subsequent covenants, unless *restrained by the nature of the subject;(m) and that a covenant implied by law, as that for [*128] quiet enjoyment resulting from the word "demise," in a lease, will be joint or several according to the nature of the interest demised;(n) though a covenant cannot be implied from one who has only an equitable interest, and who, in point of law, merely confirmed, by joining in the lease, the demise of the person legally entitled; the latter party must consequently, for breach of such a covenant, be sued alone.(o)

164. The burden as well as the benefit of such covenants as run with the land,(p) and are not personal merely,(q) passes from assignee to assignee of the reversion, by the stat. 32 H. 8, c. 34, the effect of which has been already noticed; and the remarks previously made when considering the rights of the assignee are equally applicable in determining the remedies against him.(r)

165. The heir and devisee of the lessor, though not named, are at common law bound, to the extent of assets descended or devised, by all covenants entered into by the ancestor or devisor, running with the land;(s) the heir is also bound by express covenants not running with the land, if entered into by the ancestor for himself, *and his heirs;(t) and the observations already(u) made as to the liability of the heir and [*129] devisee for breach of covenant contained in a lease by the ancestor or devisor, and committed in his lifetime, may here be referred to.

166. The personal representatives of the covenantor and lessor, though

(d) Bac. Ab., Joint Tenants, (K.) (e) Com. Dig., Abatement, (F. 9.)
(g) Co. Litt. 180, b.; 2 Bla. Com. 188; Selw. N. P. 10th ed. 714, n. (20.)
(h) Com. Dig., Estates, (G. 6.)
(i) Heatherley d. Worthington v. Weston, 2 Wils. 232; Mantle v. Wellington, Cro. Jac. 166.
(k) Bac. Ab., Joint Tenants and Tenants in Common, (K.), (H. 1); Com. Dig., Estates, (K. 8); Mantle v. Wollington, Cro. Jac. 166.
(l) Ante, ss. 141—144; Selw. N. P. 10th ed. 455.
(m) Duke of Northumberland v. Errington, 5 T. R. 522; Copland v. Laporte, 3 A. & E. 517.[s]
(n) Coleman v. Sherwin, 1 Salk. 137. (o) Smith v. Pocklington, 1 Cr. & J. 445.
(p) As to what covenants run with the land, see Woodfall, L. & T. 4th ed. 80—82.
(q) Mayho v. Buckhurst, Cro. Jac. 438. (r) Ante, s. 35.
(s) Bac. Ab., Heir, (D.) and (I); Woodfall, L. & T. 4th ed. 193; Derisley v. Custance, 4 T. R. 75.
(t) Bac. Ab., Heir, (F.) (u) Ante ss. 148—151.

[s] Eng. Com. Law Reps. 39.

not expressly named, are liable at the suit of the covenantee, in their representative character, for all breaches of covenant, whether real or personal, committed during the life of the covenantor, by reason of the privity of contract existing between themselves and the covenantee.(*x*) They are also liable for breach subsequent to the covenantor's death, of such express covenants in the lease as are not in their nature strictly personal and limited to the life of the covenantor. With respect to covenants in law, it is laid down broadly by some authorities,(*y*) that upon these the personal representatives are not liable; and it is at all events clear, that a covenant in law cannot be extended beyond the estate which the lessors could lawfully grant; it must also be observed, that all covenants between a lessor and his lessee must be either covenants in law or express covenants, the distinction between which we shall now proceed briefly to consider.

166 *a*. A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that after they have had their [*130] *primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created; as if a man by deed demise land for years, covenant lies upon the word "demise," which imports or makes a covenant in law for quiet enjoyment; or if he grant land by feoffment, covenant will lie upon the word "*dedi*." On the other hand, an express covenant is one which results from putting a proper and natural construction upon the words employed by the parties, and the legal effect and operation of such a covenant, the meaning of which has been once ascertained, whether framed in express words or whether it be matter of inference only, is precisely the same. We may add that the term "*implied* covenant" is sometimes used as meaning a covenant of this latter kind, *i. e.*, an express covenant; but it is also used with reference to a covenant which the law itself implies, in which sense it is synonymous with a "covenant in law."(*z*)

166 *b*. The following cases will serve to illustrate the rules above stated as to the liability of executors and administrators for breach of covenant subsequent to the death of the covenantor. A. B., being tenant for life with a leasing power, by indenture of lease, demised to J. W. (the plaintiff) for ninety-nine years, if three persons, named in the lease, should so long live; this lease, upon the death of the tenant for life, was held to be void, as against the remainder-man, by the judgment of a court of law, on the [*130*a*] ground that it was not made in *due conformity with the leasing power. The lease contained in it a clause in the following terms, viz.: "And the said A. B., for himself, his heirs, and assigns, the said demised premises, with the appurtenances, under the said J. W., his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions, and agreements before expressed, against all persons whatsoever

(*x*) Woodfall, L. & T. 4th ed. 598. (*y*) Shep. Touch. 178.

(*z*) See the judgment, Williams v. Burrell, 1 C. B. 427, and the cases there cited. Com. Dig. Covenant (C. 1), per Littledale, J., 5 B. & C. 609. As to 8 & 9 Vict. c. 106, s. 4, ante, s. 52.

lawfully claiming the same, shall and will during the said term warrant and defend." It was held that the above clause amounted to an *express covenant* for quiet enjoyment; that, being an express covenant, it extended to protect the whole term which was purported to be granted by the lease, and consequently that the plaintiff might recover against the executors of A. B. the value of the term, the costs of defending an action of ejectment brought by the remainder-man, and also the sum recovered by him for mesne profits.(*a*) So, where a fine was levied of a married woman's estate, with a joint power to the husband and wife to declare the uses, which they accordingly declared, in remainder to A., and the husband made a lease with a covenant for quiet possession against any one claiming under him, and A. evicted the tenant; the executors of the husband were held liable in an action on the covenant.(*b*) But where tenant for life leased for a term, before the expiration of which he died, and the lessee was evicted by the remainder-man, it was held, that no action lay by the lessee against the lessor's executors, on the covenant for quiet enjoyment implied in the word "demise," such covenant being a covenant in law, and in the nature of a warranty during, and not extending *beyond, the lessor's life;(*c*) and on a covenant merely personal, it seems, that the executor could not be charged if the breach occurred after the death of the covenantor.(*d*) [*130*b*]

167. A lessee is clearly liable on his express covenants, although broken after an assignment of the term,(*e*) and acceptance of rent by the landlord from the assignee: and in like manner are his personal representatives having assets;(*f*) the reason being that, although the privity of estate is destroyed, the privity of contract still continues: but it seems doubtful whether this rule holds in the case of covenants implied by law, which depend on privity of estate, and would, therefore, determine by assigning the estate with the landlord's assent;(*g*) and in neither case will *debt* lie after acceptance of rent from the assignee.(*h*) So, by a grant or assignment of part only of the lessee's estate, the entire privity of contract is not at an end; and the lessee would, it seems, *remain liable on his covenant to pay the entire rent; for he cannot apportion it,(*h*) as he might do in an action of debt, after receipt of rent by the landlord from the assignee.(*i*) [*131]

(*a*) Williams v. Burrell, 1 C. B. 402.
(*b*) Hurd v. Fletcher, 1 Dougl. 43.
(*c*) Adams v. Gibney, 6 Bing. 656.*
(*d*) Woodfall, L. & T. 4th ed. 599.
(*e*) Eaton v. Jacques, 2 Dougl. 455. 460; Chancellor v. Poole, 2 Dougl. 764; Orgill v Kemshead, 4 Taunt. 642.
(*f*) Bachelour v. Gage, Cro. Car. 188; Arthur v. Vanderplank, cited, Selw. N. P., 10th ed., 451, n. (r); Hellier v. Casbard, 1 Sid. 266; S. C. 1 Lev. 127; Coghil v. Freelove, 3 Mod. 325; S. C. 2 Vent. 209; Pitcher v. Tovey, 4 Mod. 76.
(*g*) Semble not, Coote, L. & T. 327; 1 Wms. Saund. 241, n. (5), ad finem; Smith's L. C. Vol. I., note to Spencer's case; Auriol v. Mills, 4 T. R. 98; Bret v. Cumberland, Cro. Jac. 523.
(*h*) Bret v. Cumberland, Cro. Jac. 522; Barnard v. Godscall, Id. 309; Ludford v. Barber, 1 T. R. 92; and see the cases collected, Selw. N. P. 10th ed. 461, n. (11), Woodfall, L. & T. 4th ed. 171, and Thursby v. Plant, 1 Wms. Saund. 241, n. (5); Marsh v. Brace, Cro. Jac. 334; Auriol v. Mills, 4 T. R. 98; 2 Wms. Saund. 302, n. (5).
(*i*) Stevenson v. Lambard, 2 East, 575.
(*i*) Broom v. Hore, Cro. Eliz. 633; Ards v. Watkin, Id. 637. 651; Stevenson v. Lambard, 2 East, 580.

*Eng. Com. Law Reps. 19.

168. A tenant underletting likewise remains liable on the original agreement of demise, unless a new agreement by the landlord to accept the undertenant in his stead can be established in evidence,(*j*) or unless the circumstances constitute a valid surrender of the tenant's interest within the Statute of Frauds;(*k*) in default of which it seems that the landlord has his remedy ex contractu not only against his own tenant, but against the party occupying, and that he may in such a case waive the trespass, and recover for the actual enjoyment of the land.(*l*) By the holding over of the subtenant, the tenant himself becomes chargeable :(*m*) and when B., lessee for a term ending October 11, underlet to C. from year to year, subject to the determination of his own tenancy, and C. held over against the will of the lessee, but finally quitted December 14, B. who had previously distrained [*132] for the rent due *October 11, was held liable for the subsequent period, during which C. retained possession.(*n*) It would rather seem, however, that there is a distinction between the case of a co-tenant and that of an undertenant, and that where there is a joint tenancy, one joint tenant is not necessarily liable for the wilful holding over of his co-tenant,(*o*) though he would clearly be so if such co-tenant held over with his assent.(*p*)

169. It seems that the liability of the assignee of lessee, on covenants running with the land, existed at common law prior(*q*) to the stat. 32 Hen. 8, c. 34, and the following rules respecting his liability have been laid down in the leading case(*r*) on this subject. First, when the covenant extends to a thing in esse parcel of the demise, the thing to be done by force of the covenant is in some manner annexed and appurtenant to the estate demised, and shall bind the assignee although not expressly named.(*s*) Hence the usual covenants to pay rent, to repair, &c., run with the land ;(*t*) and, on such covenants, the assignee of part only of the thing demised is liable,(*u*) [*133] and rent will be apportioned *accordingly,(*x*) as it also may be in case of eviction.(*y*)

170. Secondly, if the covenant relates to a thing not in esse at the time of the demise, but to be done upon the thing demised, it shall bind the

(*j*) Per Lord Kenyon, C. J., Harding v. Crethorne, 1 Esp. 57, recognized Christy v. Tancred, 7 M. & W. 130, and 9 M. & W. 448; Thomas v. Cook, 2 B. & Ald. 119. See Walls v. Atcheson, 3 Bing. 462; Hall v. Burgess, 5 B. & C. 332;[t] Grimman v. Legge, 8 B. & C. 324.[u]

(*k*) 29 Car. 2, c. 3, s. 3; Thomas v. Cook, 2 B. & Ald. 119.

(*l*) Per Parke, B., Christy v. Tancred, 7 M. & W. 129.

(*m*) Harding v. Crethorne, 1 Esp. 57; Ibbs v. Richardson, 9 A. & E. 849;[x] arg. Christy v. Tancred, 9 M. & W. 443.

(*n*) Ibbs v. Richardson, 9 A. & E. 849.[y]

(*o*) Per Parke, B., and Alderson, B., Hirst v. Horn, 6 M. & W. 396, and Christy v. Tancred, 9 M. & W. 447, 448. See, however, per Parke, B., Christy v. Tancred, 7 M. & W. 129. S. C. in error, 12 M. & W. 316; Per Parke, B., Draper v. Crofts, 15 L. J., N. S. Ex. 92.

(*p*) 9 M. & W. 438.

(*q*) Smith's L. C. vol. I., note to Spencer's case; ante, s. 51.

(*r*) Spencer's case, 5 Coke, 16. (*s*) Ib., 1st Resolution.

(*t*) See the cases, Woodfall's L. & T. 4th ed. 80–82.

(*u*) Congham v. King, Cro. Car. 221; Com. Dig., Covenant, (C. 3.) See Wollaston Hakewill, 2 Scott, N. R. 615.

(*x*) Holford v. Hatch, 1 Dougl. 183; Palmer v. Edwards, Id. 187, n.

(*y*) Stevenson v. Lambard, 2 East, 575.

[t]Eng. Com. Law Reps. 11. [u]Id. 15. [x]Id. 36. [y]Id. 36.

assignee if named;(z) as, if the covenant be to build a new wall upon the land demised;(a) or, generally, if it affect the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affect the mode of enjoying it.(b)

171. Thirdly, but if the covenant relates to a thing collateral to, and not touching or concerning the thing demised in any sort, there the assignee shall not be bound although named;(c) as, where the covenant was not to hire persons to work in a mill (about to be erected on the land demised) who were settled in other parishes without a parish certificate.(d)

172. These rules do not apply to a lease of personalty, for with property of that description a covenant does not run, as there is no privity, nor any reversion, but such covenant is merely a chose in action binding the *covenantor and his personal representatives;(e) it has therefore been held that a covenant does not run with rent.(g) But a covenant by a lessee of tithes, for himself and his assigns, not to let any of the farmers in the parish have any part of the tithes without the lessor's consent, runs with them and binds the assignee.(h) [*134]

173. Subject then to the rules thus briefly stated, we see that, during the continuance of a demise, and after assignment of the term, both the lessee and assignee(i) are liable at the suit of reversioner, and at his election;(k) the former being bound by his express covenants through privity of contract, the latter by such covenants as run with the land through privity of estate:(l) indeed the lessor may charge both the lessee and assignee, but he can take out execution against one only.(m) This liability of the assignee, however, is commensurate with the time during which he has an interest in the premises;(n) it commences when such interest commences, *and is at once determined by his assignment over; for thereby the privity of estate is destroyed;(o) and this is equally true of the assignee's personal representatives, who are themselves assignees.(p) The reversioner, however, retains his right of suit in respect of any breach of covenant committed during the continuance of the [*135]

(z) Spencer's case, 5 Co. 16, 2d Resolution.
(a) Ib.; Sampson v. Easterly, 9 B. & C. 505, affirmed in error, 6 Bing. 644.
(b) Per Lord Ellenborough, C. J., Mayor of Congleton v. Pattison, 10 East, 135; Cockson v. Cock, Cro. Jac. 125, ad finem.
(c) Spencer's case, 2d Resolution. See Mayo v. Buckhurst, Cro. Jac. 438.
(d) Mayor of Congleton v. Pattison, 10 East, 130.
(e) Spencer's case, 5 Co. 16, 3d Resolution.
(g) Milnes v. Branch, 5 M. & S. 411. 417.
(h) Bally v. Wells, 3 Wils. 25, discussed 2 Wms. Saund. 304, n. (12). See Brewer v. Hill, 2 Anstr. 412; Dean of Windsor v. Gover, 2 Saund. 302.
(i) The assignee is liable without actual possession, Williams v. Bosanquet, 1 B. & B. 238;[a] Burton v. Barclay, 7 Bing. 745;[b] Taylor v. Shum, 1 B. & P. 21.
(k) Devereux v. Barlow, 2 Saund. 181; Woodfall, L. & T. 4th ed. 597.
(l) Woodfall, L. & T. 4th ed. 76. 171, 172. As to what is sufficient evidence to render a party in possession liable as assignee of a lease, see Doe d. Hemmings v. Durnford, 2 Cr. & J. 667.
(m) Woodfall, L. & T. 4th ed. 597.
(n) Burnett v. Lynch, 5 B. & C. 589. 605.[c]
(o) Woodfall, L. & T. 4th ed. 173; Selw. N. P. 10th ed. 488, n. (33); Short v. Kalloway, 11 A. & E. 28;[d] Paul v. Nurse, 8 B. & C. 486.[e]
(p) Spencer's case, 5 Co. 16, 7th Resolution.

[a] Eng. Com. Law Reps. 5. [b] Id. 20. [c] Id. 12. [d] Id. 39. [e] Id. 15.

assignee's estate; for this is a vested liability from which the assignee cannot free himself by assignment over;(q) and in like manner, the assignee, after forfeiture and re-entry by the lessor, continues liable for rent previously accrued, notwithstanding the latter was to have the premises again, "as if the indenture had never been made."(r)

174. Where lessee for years assigns his term in a part only of the land demised, debt for rent in arrear lies against lessee and assignee, either jointly or severally at the lessor's election;(s) but whether there exists a privity of estate in respect of the whole land by an assignment of part only so as to sustain against the assignee of that part an action of debt for the entire rent, is a nice and difficult question.(t)

[*136] *175. The assignee, during his possession, is not only liable to the original landlord, but has also a duty to perform towards the assignor, to whom he is liable in assumpsit or case, even though the assignment were by deed poll, for damages resulting from non-observance of the covenants in the lease;(u) but covenant does not lie at suit of the lessee, although such assignment be made "subject to the payment of rent and the performance of the covenants in the lease;"(x) and although assignees under a void lease are not liable to the lessor in covenant, yet where they have paid the rent stipulated for by the lease, and have treated it as valid, they must be taken to hold on the terms contained in it, and will be liable to repair accordingly.(y)

176. The executors and administrators of a lessee, are liable by privity of contract, in their representative character, and to the extent of assets, for breaches of covenant in the lifetime of the testator or intestate;(z) and subsequently to his death, they are also, to the like extent, bound by his covenants, although not named therein, unless they are such as in their

[*137] nature determine *by the death of the covenantor, and such as he alone can perform.(a)

177. Where the personal representatives have entered into possession of the demised premises, and thereby created a privity of estate between themselves and the reversioner, the general rule is that they are liable personally as assignees,(b) except that, with respect to rent, their liability does

(q) Per Lord Abinger, C. B., Harley v. King, 2 Cr. M. & R. 18. 22, 23.

(r) Hartshorne v. Watson, 4 Bing. N. C. 178.[f]

(s) Bac. Ab., Joint Tenants, (K.); Bailiffs, &c., of Ipswich v. Martin, Cro Jac. 411; Garnon v. Vernon, 2 Lev. 231; 2 Wms. Saund. 182, n. (1). As to covenant against lessee after assignment of part, ante, s. 167, and against assignee of part, ante s. 169.

(t) Curtis v. Spitty, 1 Bing. N. C. 756, 760,[g] the judgment in which seems to throw some doubt on Hare v. Cator, Cowp. 766; Merceron v. Dowson, 5 B. & C. 479.[h]

(u) Burnett v. Lynch, 5 B. & C. 589,[h] recognized 1 Cr. & M. 659, and in Hancock v. Caffyn, 8 Bing. 366.[i] But case is the more proper form of action. Ib.

(x) Wolveridge v. Steward, in error, 1 Cr. & M. 644, reversing S. C. 9 Bing. 60;[k] and Mills v. Harris, cited 1 Cr. & M. 659; Burnett v. Lynch, 5 B. & C. 589. 602.[k]

(y) Beale v. Sanders, 3 Bing. N. C. 850.[l] See Andrew v. Pearce, 1 B. & P., N. R. 158.

(z) Woodfall, L. & T. 4th ed. 598—600. See Ackland v. Pring, 3 Scott N. R. 297.

(a) Selw. N. P. 10th ed. 484; Com. Dig. Covenant, (C. 1); Bac. Ab. Executors and Administrators, (P. 1); Adams v. Gibney, 6 Bing. 556;[m] Hyde v. Dean of Windsor, Cro. Eliz. 553; Bridgman v. Lightfoot, Cro. Jac. 671.

(b) Buckworth v. Simpson, 1 Cr. M. & R. 834; Remnant v. Bremridge, 8 Taunt 191[n] —seems to be badly reported; see per Patteson, J., 3 P. & Dav. 649; Buckley v. Pirk, 1 Salk. 316. See the judgment in Wollaston v. Hakewill, 3 Scott, N. R. 614.

[f] Eng. Com. Law Reps. 33. [g] Id. 27. [h] Id. 11. [i] Id. 21. [k] Id. 23.
[l] Id. 32. [m] Id. 19. [n] Id. 4.

not exceed what the property yields; for rent is received by them, not so much in the light of assets, as a profit of the land, which is to be handed over to the landlord in satisfaction or diminution of arrears that may be due; but no such exception applies to the covenant for repairs.(*c*) It should be observed, too, that an executor with assets cannot waive a term of years, even if utterly valueless; and if he do not enter on the demised premises, without *renouncing the executorship *in toto*.(*d*) But should there be no assets, and the property be insufficient to pay the rent, it seems that he may relinquish the lease;(*e*) and that if there be assets sufficient to pay the rent for a part only of the term, he may when such assets become exhausted, waive possession on giving notice to the lessor.(*g*) [*138]

178. Where executors continued in occupation of premises demised to testator for one year certain, and afterwards from year to year, with power to determine the tenancy by notice to quit, which, however, was not given by the landlord, they were held personally chargeable on the terms of the original demise; the promise to abide by them being implied by law from the above facts.(*h*) But entry by one of two executors of a deceased tenant, does not enure as an entry by both, so as to render them jointly liable in an action for use and occupation.(*i*)

179. Assignment by the lessee, and acceptance of rent by the reversioner, will not discharge the executors of the former; for the privity of contract on express covenants still exists;(*k*) though debt will not lie after acceptance of *rent;(*l*) and in covenant against the executors of a lessee, who, as already stated, will be liable without entry to the extent of assets,(*m*) breaches may be laid as well by the testator as by an assignee of the term under an assignment from the executors, after the will had been proved.(*n*) [*139]

180. The executor of an assignee is, in law, an assignee of the term; and if he enters, and by such entry becomes possessed, may be charged as such generally for breaches of covenant after the testator's death; if he does not enter, he may defend himself by alleging, that he is no otherwise assignee than as executor, and that he has never entered or taken possession of the demised premises. On the other hand, if the executor is sought

(*c*) Per Tyndal, C. J., and Bosanquet, J., Tremeere v. Morison, 1 Bing. N. C. 97. 99;[o] Tilney v. Norris, 1 Lord Raym. 553; Bull v. Wheeler, Cro. Jac. 647; Hornidge v. Wilson, 3 P. & D. 641; Per Denman, C. J., delivering the judgment of the court, Rubery v. Stevens, 4 B. & Ad. 245;[p] Buckley v. Pirk, 1 Salk. 316; Remnant v. Brembridge, 8 Taunt. 191.[n] Quære, whether in respect of this liability, there is any difference between the case of an executor and that of an administrator?—Per Tindal, C. J., 1 Bing. N. C. 98. 99.[o]

(*d*) Woodfall, L. & T. 4th ed. 194. See the judgment in Rubery v. Stevens. 4 B. & Ad. 244,[q] and in Nation v. Tozer, 1 Cr. M. & R. 176; Howse v. Webster, Yelv. 103; Per Lord Lyndhurst, C. B., Reid v. Lord Tenderden, 4 Tyrw. 118, and n. (*a*).

(*e*) Semble, Ried v. Lord Tenderden, 4 Trw. 111; see n. (*d*) supra.

(*g*) Ib. (*h*) Buckworth v. Simpson, 1 Cr. M. & R. 834.

(*i*) Nation v. Tozer, 1 Cr. M. & R. 172. Quære, whether an action of debt, for rent accruing due after the testator's death, would lie against both jointly. Id. 176.

(*k*) Bret v. Cumberland, Cro. Jac. 521, 522.

(*l*) Ante, s. 167.

(*m*) Ante, s. 177. See also Atkins v. Humphrey, 15 L. J., N. S., C. P., 120.

(*n*) Wilson v. Wigg, 10 East, 313. See Thacker v. Wilson, 3 A. & E. 142.[r]

[n]Eng. Com. Law Reps. 4. [o]Id. 27. [p]Id. 24. [q]Id. 24. [r]Id. 30.

to be charged as such, the defence open to him is by alleging, that the term is of no value, and that he has fully administered all the assets which have come to his hands.(o)

181. An under lessee cannot be sued in covenant on the original lease, for there is no privity between him and the reversioner.(p) But a demise by lessee for a longer term than his own operates in law as an assignment, [*140] *even though the rent reserved in the underlease exceed that originally reserved.(q) And with reference to the lessee, the difference between an assignee and a sub-lessee is this,—that the assignee is a surety for the lessee, and liable accordingly; whereas, the only contract of the sub-lessee is, to perform the covenants in his sub-lease, but not, unless there be a specific covenant for that purpose, to indemnify the lessee against the costs of an action at suit of the lessor.(r)

2. Principal and Agent.

Liability of Principal.—General Rule and Exceptions, ss. 182—184. Agent for the purchase of Goods, &c., ss. 185—189. Agent for the sale of Goods, ss. 190, 191. Stakeholder, s. 192. Auctioneer, ss. 193, 194. Consignor, Consignee, and Carrier, or Shipowner, ss. 195—198. Liability of Master and Shipowner for Repairs, &c., ss. 199—201. Public Officers and Servants of the Crown, Trustees, &c., ss. 202—205. Liability of the Members of a Club, s. 206.

182. Where A. enters into a contract as agent for B., and is merely the medium by which the same is effected, the liability in respect of such [*140 *a*] contract rests with B.;(s) *and if a person contracts in writing, describing himself as agent and naming his principal, the principal will be bound, provided the agent had authority, to enter into the contract on his behalf; and in order to charge the agent, it will be necessary to show by clear proof the absence of such authority, or that the authority given has been exceeded.(t) For instance, A. B. C. and D. carried on business as bankers, and issued a promissory note in this form:—"I promise to pay the bearer on demand 5*l.* value received;" and signed thus,—"For A. B. C. and D., (signed) B." It was held overruling Hall v.

(o) See the judgment in Wollaston v. Hakewill, 3 Scott, N. R. 613, 614, and the authorities cited in the argument.

(p) Holford v. Hatch, Dougl. 183, cited Brewer v. Hill, 2 Anstr. 419; Earl of Derby v. Taylor, 1 East, 502; Stone v. Evans, cited Woodfall, L. & T. 4th ed. 602. See Hicks v. Downing, 1 Lord Raym. 99; S. C. 1 Salk. 13.

(q) Wollaston v. Hakewill, 3 Scott, N. R. 593. See Barrett v. Rolph, 14 M. & W. 348;† Oxley v. James, 13 M. & W. 209.†

(r) Penley v. Watts, 7 M. & W. 601;† Walker v. Hatton, 10 M. & W. 249;† after which cases it seems that Neale v. Wyllie, 3 B. & C. 533,* cannot be supported. See also Duffield v. Scott, 3 T. R. 374; Jones v. Williams, 7 M. & W. 493;† Blyth v. Smith, 6 Scott, N. R. 360.

(s) See Goodall v. Lowndes, 6 Q. B. 464.

(t) Downman v. Jones, (in error,) 14 L. J., N. S., Q. B., 226, reversing the judgment in S. C., 4 Q. B. 235 (*a*).‡ Chamberlain v. Hammond, Law Times, vol. vii. p. 226; Harper v. Williams, 4 Q. B. 219; post, s. 184.‡

*Eng. Com. Law Reps. 10. ‡Id. 45. †Reprinted at $2.50 per vol.

Smith,(u) that the holder of this note had not a separate right of action against B. the party signing, but that the firm were liable; and Parke, B., observed.—"This is primâ facie a promise by one partner for himself and the other three partners, and it amounts to one promise of the four persons constituting the firm, and if B. had authority the firm is bound.(x) I really must say that I think Hall v. Smith cannot be supported. The partner in making the promise is only an agent for the firm. Then does it bind him personally, or does it bind the firm? No doubt the instrument was intended to bind the firm, and as he had authority as a partner to do it, it had that effect."(y)

182 *a*. The real question, then, in all these cases is *with whom was the contract made; and in answering this question, [*140 *b*] the jury will have to consider whether the party, through whose instrumentality the contract is alleged to have been made, had in fact authority to make it. Thus assumpsit for work and labour, in writing certain literary articles, was brought against the defendants, whose names appeared as proprietors of a newspaper in the declaration filed under 6 & 7 Wm. 4, c. 76, they had in fact ceased to be so before the contract was entered into, at which time L. was the sole proprietor; the jury found that the contract was made by L. on his own behalf, without any authority from the defendants; and also that the plaintiff, when he supplied the articles in question, did not know the defendants to be proprietors. Held that although the declaration above mentioned was under the provisions of the statute (s. 8,) conclusive evidence of the fact that the defendants were proprietors, yet the real question was with whom the contract had been made, and that upon the finding of the jury the defendants were not liable.(z) We conceive that it would be useless to cite cases expressly to show that a person cannot be bound by a contract, the making of which he has in no way authorized. Many illustrations of this proposition will, however, occur in the course of the ensuing pages, and in the Appendix.

182 *b*. Provided, however, the party contracting had authority from the party sought to be charged as principal, it matters not whether such authority was express or implied, or resulted in law from *a subse- [*141] quent sanction and recognition by the principal;(r) and, as a general rule, the extent of the agent's authority (as between his principal and third parties) must be measured by the extent of his usual employment.(s) This rule, moreover, is applicable to every species of mercantile transaction, and whether the agent have or have not been dismissed from

(u) 1 B. & C. 407.[a] (x) See Jones v. Corbett, 2 Q. B. 828.[x]

(y) Ex parte Buckley, in re Clarke, 14 M. & W. 469.[♦]

(z) Holcroft v. Hoggins, 15 L. J., N. S., C. P., 129.

(r) Chitt. Contr. 3rd ed. 212—221. 227; see other cases, 2 Selw. N. P. 10th ed. 1094—1096; Per Littledale, J., Thomson v. Davenport, 9 B. & C. 90;[a] Attwood v. Munnings, 7 B. & C. 278;[b] Davidson v. Stanley, 3 Scott, N. R. 49. As to payment to an agent, Chitt. Contr. 744—747; Rotton v. Inglis, 11 Law Journ., N. S., Q. B. 97. There is no implied authority in a member of a joint-stock company to accept bills of exchange on the part of the directors, or of the company; Bramah v. Roberts, 3 Bing. N. C. 963;[c] nor has a resident agent of a mining company any implied authority to borrow money on the credit of the shareholders. Hawtayne v. Bourne, 7 M. & W. 595.[♦]

(s) Smith's Merc. Law, 2nd ed. p. 93.

[a]Eng. Com. Law Reps. 8. [x]Id. 42. [a]Id. 17. [b]Id. 14. [c]Id. 32.
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his employer's service, provided that the third party had no reason to be aware of the determination of his employment. But an important distinction is to be observed between a *general* and a *particular* agent: the authority of the former, to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him; whereas it is the duty of the party dealing with the latter to ascertain the extent of his authority; and, if the party so dealing do not, he must abide the consequences.(*t*)

183. When one, who is in truth an agent, executes a deed as principal he will clearly be liable thereon; as, *if he covenant for himself, his [*142] heirs, &c., and under his own hand and seal, for the act of another, though he describe himself in the deed as covenanting for and on the part and behalf of such other person.(*u*) So, where the directors of a company covenanted after a certain time to pay the purchase-money of a mine out of the payments to be made by the shareholders, and subject to certain provisoes, they were held personally liable on the expiration of the stipulated period;(*x*) and so was a party, who entered into a bond of submission to an award, though on behalf of another.(*y*) An agent executing a deed for his principal, under a power of attorney, should sign in the name of the principal, or for his principal as agent;(*z*) and, in order so to bind his principal, he must be authorized by deed.(*a*)

184. So, where an agent signs a contract in writing, though not under seal, as principal, he renders himself liable.(*b*) But the true construction of the instrument must be considered, in order to collect the intention and understanding of the parties;(*c*) and to determine, for instance, whether a contract be to pay for another, or *whether it be a contract on behalf [*143] of another to pay.(*d*) Hence, a broker signing a contract(*e*) as principal in his own name is liable; and so, if he put his name to a bill of exchange, for, by so doing, he makes himself personally responsible, unless in terms he qualifies that responsibility.(*g*) In like manner, will an attorney incur liability, who enters into an agreement nominally as principal, though really for his client;(*h*) though a contract will not in general be

(*t*) Id. 94. 96, 97, and cases there cited.
(*u*) Appleton v. Binks, 5 East, 148. See Hunter v. Parker, 7 M. & W. 322. 344.
(*x*) Hancock v. Hodgson, 4 Bing. 269.[d]
(*y*) Bacon v. Dubarry, 1 Lord Raymond, 246.
(*z*) White v. Cuyler, 6 T. R. 176; Wilks v. Back, 2 East, 142. See Hunter v. Parker, 7 M. & W. 343; ante, s. 55.
(*a*) Ante, s. 55. See Bell v. Tuckett, 11 Law Journ., N. S., C. P. 92.
(*b*) Per Best, C. J., Norton v. Herron, 1 C. & P. 648;[e] Burrell v. Jones, 3 B. & Ald. 47;[f] post, s. 187.
(*c*) Spittle v. Lavender, 2 B. & B. 452,[g] and per Dallas, C. J., Id. 454.
(*d*) Per Lord Lyndhurst, C. B., Hall v. Ashurt, 1 Cr. & M. 716. 719.
(*e*) Magee v. Atkinson, 2 M. & W. 440; Jones v. Littledale, 1 Nev. & P. 677; Higgins v. Senior, 8 M. & W. 834; post, s. 187.
(*g*) Sowerby v. Butcher, 2 Cr. & M. 368; Per Lord Ellenborough, C. J., Leadbitter v. Farrow, 5 M. & S. 345. 349; Lefevre v. Lloyd, 5 Taunt. 749; Goupy v. Harden, 7 Taunt. 159;[h] Higgins v. Senior, 8 M. & W. 844, 845.
(*h*) Hall v. Ashurst, 1 Cr. & M. 714; Iveson v. Conington, 1 B. & C. 160;[i] Watson v. Murrel, 1 C. & P. 307;[k] Prosser v. Allen, Gow, R. 117;[l] Redhead v. Cator, 1 Stark. R. 14.[m]

[d]Eng. Com. Law Reps. 13. [e]Id. 11. [f]Id. 5. [g]Id. 6. [h]Id. 2. [i]Id. 8. [k]Id. 11. [l]Id. 5. [m]Id. 2.

implied by law so as to render him liable,(i) unless credit be given to him instead of his principal in the usual course of business, as by his town agent, or by his special bailiff:(k) and a partner, who draws a bill of exchange, with the privity of his copartners, in his own name, the proceeds of which, when discounted, are carried to the partnership account, can alone be sued thereon, the money not having been *advanced on the general security of the partnership;(l) although an action for money lent would lie in this case against the firm, if circumstances shewed that the advance was made by way of loan to the partnership;(m) and, if business be carried on by a firm in the name of one partner only, it will be bound by his indorsement, provided it be shewn that the credit of the firm was thereby pledged, and not that of the individual member.(n) [*144]

185. The following rules will determine who ought to be sued on a contract for the purchase of property:—And, first, an agent contracting as principal is liable in that character; and, if the real principal be known to the vendor at the time of the contract being entered into by the agent dealing in his own name, and credit be given to such agent, the latter only can be sued on the contract.(o) But where the captain of a ship took in payment of freight the agent's bill on his own principal, which was not paid, the latter was still held liable on the charter-party.(p)

186. On the other hand, if, in the case just considered, the seller make his election to debit the principal, he cannot afterwards resort to the agent.(q) Whether *credit was given to one party or the other, in any particular case, must be determined by the jury; and although, on the Stock Exchange, there is an understanding between parties purchasing and selling stock, that the broker shall be held liable, notwithstanding the principal be disclosed, yet this custom does not universally prevail, and cannot preclude the seller from giving credit to the principal if he think proper;(r) and where a del credere agent being instructed to sell goods "for account of" his principal, who resided out of England, contracted in his own name, evidence of such a custom in the London corn market was held admissible.(s) But evidence of a custom in the tallow trade, where [*145]

(i) Robins v. Bridge, 3 M. & W. 114, and cases there cited; Hartop v. Juckes, 2 M. & S. 438.

(k) Scrace v. Whittington, 2 B. & C. 11;[n] Foster v. Blakelock, 5 B. & C. 328;[o] Kennedy v. Gouveia, 3 D. & R. 503; Townshend v. Carpenter, R. & M. 314.[p] See Becke v. Cattell, 4 Scott, N. R. 246.

(l) Emly v. Lye, 15 East, 7; Denton v. Rodie, 3 Camp. 493; Bawden v. Howell, 4 Scott, N. R. 331. See post, s. 208.

(m) Denton v. Rodie, 3 Camp. 493. See per Bayley, B., Smith v. Craven, 1 Cr. and J. 507.

(n) South Carolina Bank v. Case, 8 B. & C. 427.[q] See Furze v. Sharwood, 11 Law Journ., N. S., Q. B. 119; post, s. 187.

(o) Paterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574; Thomson v. Davenport, 9 B. & C. 78. 90.[r]

(p) Tapley v. Martens, 8 T. R. 451. (q) Per Littledale, J., 9 B. & C. 90.[r]

(r) Mortimer v. M'Callan, 6 M. & W. 58. See per Lawrence, J., Child v. Morley, 8 T. R. 615, cited per Bosanquet, J., Young v. Coke, 3 Bing. N. C. 731;[s] Sutton v. Tatham, 10 A. & E. 27.[t]

(s) Johnston v. Usborne, 11 A. & E. 549,[u] and the cases there cited. See Trueman v. Loder, 11 A. E. 589,[u] and the cases collected, Id. 600, n. (b);[u] Stewart v. Aberdein, 4 M. & W. 211.

[n] Eng. C. L. Reps. 9, [o] Id. 12. [p] Id. 21. [q] Id. 15. [r] Id. 17. [s] Id. 32. [t] Id. 37. [u] Id. 39.

the contract of sale was concluded by a broker, who signed bought and sold notes, and acted for both parties, that a party might reject the undisclosed principal, and look to the broker for the completion of the contract, was held to have been properly rejected as varying a written instrument.(*t*)

187. Secondly, if the principal be unknown at the time of contracting, whether the agent represent himself as such or not, the vendor may, on discovering the principal, debit either at his election ;(*u*) as, where a duly authorized agent signs a contract in his own name, either *he may [*146] be sued thereon as principal, or on the other hand, it is competent to shew that he entered into the contract as agent, so as to charge the real principal: (*x*) and this evidence in no way contradicts the written agreement; it does not deny that it is binding on those whom, on the face of it, it purports to bind, but shews that it also binds another by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal.(*y*) And the rule just stated applies equally to written as to parol contracts ;(*z*) except in the case of bills of exchange, which stand upon the law merchant, and promissory notes, which are placed on the same footing by statute ;(*a*) and on neither of which instruments can any, but the parties named therein by their name or firm be made liable ;(*b*) though it should be observed, that, if a bill be drawn on the partnership firm, and accepted by an individual member in his own name, this instrument will bind all the partners, because it must *be under- [*147] stood to be accepted according to the terms in which it is drawn.(*c*)

188. In the case of a policy of insurance, however, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker; nor does the latter pay it to the underwriter; but, as between the assured and the underwriter, the premiums are considered as paid, and the receipt of them is acknowledged by the policy. Hence, the underwriter ordinarily looks to the broker for payment, and he to the assured.(*d*) Where, however, the policy was under seal, and contained a covenant by the broker to pay the premiums, but no acknowledgement of their receipt: it was held that the assurer, having expressly agreed to look to the broker alone for

(*t*) Trueman v. Loder, 11 A. & E. 589.[a]

(*u*) Thomson v. Davenport, 9 B. & C. 78 ;[x] Per Park, J., Robinson v. Gleadow, 2 Bing. N. C. 161, 162 ;[a] Paterson v. Gandasequi, 15 East, 62; Railton v. Hodgson, 4 Taunt. 576, n.; Wilson v. Hart, 7 Taunt. 295; Higgins v. Senior, 8 M. & W. 834.

(*x*) Per Parke, B., delivering the judgment of the Court, Higgins v. Senior, 8 M. & W. 844.

(*y*) Higgins v. Senior, 8 M. & W. 845, distinguishing Wilson v. Hart, 7 Taunt. 295; Hill v. Perrott, 3 Taunt. 274. See Lucas v. Godwin, 3 Bing. N. C. 737.[b]

(*z*) Beckham v. Drake, 9 M. & W. 79, affirmed as to this point, 11 M. & W. 315, virtually overruling as to this point, Beckham v. Knight, 4 Bing. N. C. 243,[c] affirmed on a point of pleading, 1 Scott, N. R. 675.

(*a*) 3 & 4 Ann. c. 9.

(*b*) Per Lord Abinger, C. B., and Parke, B., Beckham v. Drake, 9 M. & W. 92. 96; judgment in 8 M. & W. 844, 845; Siffkin v. Walker, 2 Camp. 308.

(*c*) Mason v. Rumsey, 1 Camp. 384; Wells v. Masterman, 2 Esp. 731; Dolman v. Orchard, 2 C. & P. 104 ;[d] as to a partner's authority to accept bills for and in the name of the firm, post, s. 208.

(*d*) Per Bayley, J., Power v. Butcher, 10 B. & C. 339—341 ;[e] Per Lord Ellenborough, C. J. Jenkins v. Power, 6 M. & S. 287; Dalzell v. Mair, 1 Camp. 532.

[a]Eng. Com. Law Reps. 39. [x]Id. 17. [a]Id. 29. [b]Id. 32. [c]Id. 33. [d]Id. 12. [e]Id. 21.

the premiums, could not recover them from the assured; and that the latter was consequently liable to the broker for the amount which he had so covenanted to pay.(e) Again, where a British merchant effects a purchase for foreign principal, the credit is considered, by the usage of trade, as given exclusively to the former:(f) and this qualification must *also be borne in mind that the principal shall not be prejudiced by the fact [*148] of credit having been given to the agent;(g) as, by having in the interval inspected the agent's accounts, and having adopted in consequence a different course of dealing with him.(h) On the other hand, if the time for payment have not elapsed, the principal cannot, by prematurely settling with his agent, deprive the vendor of his right of election.(i)

189. Thirdly, if a person act as agent without authority he is personally and solely liable; and, if he exceed his authority, the principal is not bound by acts done beyond the limits of his legitimate authority; and the remedy is against the party assuming to contract.(k) If "A. employs B. to work for C., without warrant from C., A. is liable to pay for it:"(l) nor does it make any difference that B. believed A. to be in truth the agent of C.;(m) for, in order to charge the last-mentioned party, the plaintiff must prove a contract with him, express or implied, and with him in the *character [*149] of a principal, either directly or through the intervention of an agent.(n)

189 *a*. It was recently observed,(o) that the cases decided with reference to the liability of an agent, who, having in fact no authority, professes to bind his principal, may be arranged in three distinct classes:—1st, where the agent makes a fraudulent misrepresentation of his authority, with an intention to deceive; 2ndly, where he has no authority, and knows it, but nevertheless makes the contract as having such authority, though without any fraudulent intention;(p) 3rdly, where a party contracting as agent bonâ fide believes that he has authority so to contract, but has in fact no such authority, as if he acted on a forged warrant of attorney, which he believed to be genuine. To these three classes may be added a fourth, viz., where an agent, who had originally full authority to contract, contracts in the name of the principal, after such authority has in fact been revoked, but in ignorance of such revocation. Now in the first three of the above classes of cases, the agent will be personally liable, on the ground either of fraud or of misrepresentation of a fact peculiarly within his own knowledge. With

(e) Power v. Butcher, 10 B. & C. 329;[e] and see the cases there cited.
(f) Thomson v. Davenport, 9 B. & C. 87, 88;[f] Paterson v. Gandasequi, 15 East, 69.
(g) Per Lord Tenterden, C. J., Thomson v. Davenport, 9 B. & C. 86.[g]
(h) Wyatt v. Marquis of Hertford, 3 East, 147; Kymer v. Suwercropp, 1 Camp. 109; Robinson v. Reid, 9 B & C. 449,[h] and cases there cited.
(i) Kymer v. Suwercropp, 1 Camp. 109.
(k) Woodin v. Burford, 2 Cr. & Mees. 391; Wilson v. Barthrop, 2 M. & W. 863; Fenn v. Harrison, 3 T. R. 757; Polhill v. Walker, 3 B. & Ad. 114;[k] Per Lord Abinger, C. B., Acey v. Fernie, 7 M. & W. 154.
(l) Dictum of Lord Holt, Ashton v. Sherman, Holt, R. 309;[i] cited 2 M. & W. 218.
(m) Thomas v. Edwards, 2 M. & W. 215.
(n) See the judgment, 2 M. & W. 216, 217; Turner v. The Mayor of Kendal, 13 M. & W. 171; Spurrier v. Allen, 2 Car. & K. 210; Redmond v. Smith, 8 Scott, N. R. 250.
(o) Judgment, 10 M. & W. 9.[o]
(p) See Polhill v. Walter, 3 B. & Ad. 114.[k]

[e] Eng. Com. Law Reps. 21. [f] Id. 17. [g] Id. 17. [h] Id. 22. [i] Id. 3. [k] Id. 23.
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respect to the fourth class, however, it has been held, that where the agent is guilty of no mala fides, no want of due diligence in acquiring knowledge of the revocation, and does not omit to state any fact within his knowledge [*150] relating to it, the *continuance of the authority, moreover, being a fact equally within the knowledge of both contracting parties, the agent cannot be made personally liable on the contract so entered into.(q)

190. An agent for the sale of goods is liable to an action for money had and received, at suit of the vendee, for any mistake in the price, or otherwise, so long as he stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it:(r) and although evidence is admissible on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal, yet it is clear, that if the agent contracts in such a form as to make himself personally liable—as for non-delivery of goods described in the invoice as bought of him—he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.(s) It should be added, that if money be illegally or wrongfully received, payment over to the principal is no defence to an action for its recovery.(t)

[*151] *191. In general, an agent who receives money on behalf of his principal, and for some third person, cannot be sued for it by the latter; for the privity of contract is between the principal and agent on the one hand, and between the principal and the third party on the other.(u) Care is, however, frequently necessary in determining between which of the parties a sufficient privity exists, to sustain an action; for one who is primâ facie an agent merely may by his own wrongful act create a privity in law between himself and the party with whom he has been dealing on behalf of his principal. Where, for instance, lands having been mortgaged were reconveyed to the mortgagor on payment by him of the principal and interest, and in order to obtain the deeds from the mortgagee's attorneys, who claimed to have a lien upon them for their bill of costs against the mortgagee, the mortgagor was obliged to pay these costs under protest: it was held, that he might recover them from the attorneys as money had and received to his use; and in answer to the objection that there was no privity between the parties, the Court observed, that in Bamford v. Shuttleworth(x)

(q) Smout v. Ilbery, 10 M. & W. 1.♦

(r) Per Lord Ellenborough, C. J., Cox v. Prentice, 3 M. & S. 348, and Buller v. Harrison, Cowp. 566, recognised in M'Carthy v. Colvin, 9 A. & E. 616, 617.[l] See Bradbury v. Anderton, 1 Cr. M. & R. 486; Horsfall v. Handley, 8 Taunt. 136.[m]

(s) Per Lord Denman, C. J., Jones v. Littledale, 6 A. & E. 486. 490.[n] See Moore v. Clementson, 2 Camp. 22.

(t) Miller v. Aris, 1 Selw. N. P. 10th ed. 84, n. (36), and cases there cited; Smith v. Bromley, 2 Dougl. 696, n.; Snowdon v. Davis, 1 Taunt. 359, cited Smith v. Sleap, 12 M. & W. 585.♦

(u) Stephens v. Badcock, 3 B. & Ad. 354;[o] Bamford v. Shuttleworth, 11 A. & E. 926;[p] Stead v. Thornton, 3 B. & Ad. 357, n. (a);[q] Sims v. Brittain, 4 B. & Ad. 375;[r] Clark v. Dignam, 3 M. & W. 478;[s] Sewell v. Raby, 6 M. & W. 22;[t] Sadler v. Evans, 4 Burr. 1984, recognised in Greenway v. Hurd, 4 T. R. 555; Baron v. Husband, 4 B. & Ad. 611, 612, recognised in Howell v. Batt, 5 B. & Ad. 504. 506.[u]

(x) 11 A. & E. 926.[p]

[l]Eng. Com. Law Reps. 36. [m]Id. 4. [n]Id. 33. [o]Id. 23. [p]Id. 39. [q]Id. 23. [r]Id. 24. [s]Id. 27. [t]Id. [u]Id. ♦Reprinted at $2.50 per vol.

the attorney received the money merely as agent for his client, to whom alone he was responsible; that "the attorneys insisted on withholding the deeds *for their own benefit, to secure the payment of their own bill. It is a mistake to say, that there is no privity between the [*152] plaintiff and defendants. The privity in the original transaction was indeed between the defendants and their client; but when the defendants compelled the plaintiff to part with money, in order to regain possession of his rights, the law created a privity between them, and implied a promise to repay what the defendants should appear to have improperly obtained."(y)

191 *a*. An agent who receives money for a specified purpose, and applies it to that purpose, is not legally answerable for any loss thereby incurred: as, if he remit money on commission, in pursuanee of instructions, and the remittee become bankrupt prior to its being paid over to the principal;(z) or if he be employed as a mere gratuitous carrier, or made the gratuitous channel of conveyance or delivery, under circumstances which lead to no suspicion that the transfer may not be made lawfully, and without injury to the right of any third person.(a)

192. An arbitrator or stakeholder is discharged from liability by payment over to the successful party,(b) and if a stakeholder receive a cheque by way of deposit to abide the decision of a referee, that decision must be communicated to him previously to commencing an *action for recovery [*153] of the deposit.(c) Prior to the recent statute, 8 & 9 Vict. c. 109, in the case of an illegal wager, either party might recover from the stakeholder his deposit, whether the wager were decided or not, provided he demanded the return of his stake before payment over to the winner;(d) but if legal, it seems that neither party could, except by assent of all parties, recover back his stake before the determination of the event;(e) and now the 18th section of the above act provides that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void, and that no action shall be brought for recovering any money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

193. An auctioneer is a stakeholder between the vendor and vendee, and liable accordingly.(f) On the sale of an estate being effected, he

(y) Wakefield v. Newbon, 6 Q. B. 276. 281; Davies v. Vernon, 6 Q. B. 443; Smith v. Sleap, 12 M. & W. 585. 588.♦

(z) M'Carthy v. Colvin, 9 A. & E. 607.[s] See Snowdon v. Davis, 1 Taunt. 359; Mackersy v. Ramsays, 9 Cla. & Fin. 818.

(a) Per Lord Tenterden, C. J., Tope v. Hockin, 7 B. & C. 111;[t] Coles v. Wright, 4 Taunt. 198.

(b) Tope v. Hockin, 7 B. & C. 101.[t]

(c) Wilkinson v. Godefroy, 9 A. & E. 536.[u] See also Duncan v. Cafe, 2 M. & W. 244;♦ Cowling v. Beachum, 7 Moore, 465.

(d) Hastelow v. Jackson, 8 B. & C. 221,[x] as to which case see Mearing v. Hellings, 14 M. & W. 712.♦ See also Allport v. Nutt, 14 L. J., N. S., C. P. 272; Thorpe v. Coleman, Id. 260; Hodson v. Terrill, 1 Cr. & M. 797.

(e) Emery v. Richards, 14 M. & W. 728.♦ See Homes v. Lock, 1 C. B. 524; Challand v. Bray, 11 Law Journ. N. S., Q. B., 204; Marryat v. Broderick, 2 M. & W. 369. 372; Eltham v. Kingsman, 1 B. & Ald. 683.

(f) Burrough v. Skinner, 5 Burr. 2639; White v. Bartlett, 9 Bing, 378;[y] Hardman v.

[s] Eng. Com. Law Reps. 36. [t] Id. 14. [u] Id. 36. [x] Id. 15. [y] Id. 23.
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receives a sum of money, which is to be paid in one event to the vendor, [*154] that is, *provided the purchase is completed; and in the other, if it is not completed, to the vendee: he holds the money in the meantime, as stakeholder, and he is bound to keep it, and pay it over, upon either of these events, immediately.(*g*)

194. An auctioneer may or may not be agent for both parties; if he is so, this must result from the facts of the particular case,(*h*) and is not a necessary, though it is a primâ facie inference from the character in which he acts. An auctioneer's clerk was held to be so, who entered in the sale-book the names of the highest bidders at an auction, with their acquiescence.(*i*) And an auctioneer may bind the highest bidder at an auction, by signing his name in the catalogue to which the conditions of sale are annexed;(*k*) though this, it was held, would not suffice to take the case out of the statute, in an action against the vendee by the auctioneer, on the ground that one of the contracting parties cannot be the agent of the other [*155] for the purpose of signing.(*l*) If an *auctioneer sell property, with notice that it does not belong to his principal, he will be personally liable for the produce of the sale.(*m*)

195. It is not intended to consider generally the law respecting the liability of carriers; but we may observe that a carrier receiving goods impliedly and primâ facie undertakes to carry them to the party whose address is upon them; that the fact of their coming to him through a series of agents does not prevent his being liable to the sender; and that he cannot, in such a case, throw back the liability upon the earliest agent.(*n*) The undertaking of the keeper of a booking-office, on the other hand, is to deliver to the carrier or at the proper coach-office, and, by such delivery, he is discharged from liability.(*o*) The declaration against common carriers may be framed either in tort on the custom of the realm, in which case a verdict may of course be found against one defendant only, or in assumpsit on the promise, which the law implies from the nature of the contract;(*p*) and, in which latter case, the non-joinder of a co-defendant is now no ground for pleading in abatement.(*q*)

196. The shipper and owner of goods is (in absence of any special cus-

Willcock, Id. 382, n. (*a*); Duncan v. Cafe, 2 M. & W. 244;* Harrington v. Hoggart, 1 B. & Ad. 577.[a]

(*g*) Per Parke, J., Harrington v. Hogart, 1 B. & Ad. 588, 589.[m] See Fitt v. Cassanet, 5 Scott, N. R. 902.

(*h*) Bartlett v. Burnell, 4 A. & E. 792;[b] Mesnard v. Aldridge, 3 Esp. 271. See Hinde v. Whitehouse, 7 East, 558; Emerson v. Heelis, 2 Taunt. 38; Simon v. Motivos, 3 Burr. 1921.

(*i*) Bird v. Boulter, 4 B. & Ad. 443.[b] See Gosbell v. Archer, 2 A. & E. 500;[c] Graham v. Musson, 5 Bing. N. C. 603;[d] recognized, Graham v. Fretwell, 4 Scott, N. R. 25.

(*k*) Kenworthy v. Schofield, 2 B. & C. 945;[e] per Rolfe, B., Eden v. Blake, 13 M. &. W. 619.*

(*l*) Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 B. & Ad. 333,[f] cited per Maule, J., Wethered v. Calcutt, 5 Scott, N. R. 416; but see Bird v. Boulter, 4 B & Ad. 447, 448;[g] Rayner v Linthorne, R. & M. 325. (*m*) Hardacre v. Stewart, 5 Esp. 103.

(*n*) Syms v. Chaplain, 5 A. & E. 642;[b] Muschamp v. Lancaster and Preston Railway Company, 8 M. & W. 428, 429. (*o*) Ib.; Gilbart v. Dale, 5 A. & E. 543.[h]

(*p*) 1 Selw. N. P. 10th ed. 409, 410; Pozzi v. Shipton, 8 A. & E. 963;[i] judgment, Boorman v. Brown, 3 Q. B. 525;[k] S. C. 11 Cla. & Fin. 1.

(*q*) 11 Geo. 4 and 1 Will. 4, c. 68, s. 5. See Pozzi v. Shipton, 8 A. & E. 963.[i]

[a]Eng. Com. Law Reps. 20. [b]Id. 20. [b]Id. 31. [c]Id. 29. [d]Id. 35. [e]Id. 9. [f]Id. 7. [g]Id. 24. [h]Id. 31. [i]Id. 35. [k]Id. 43. *Reprinted at $2.50 per vol.

tom to the contrary) the party to be sued for their carriage or freight, for by him the contract to pay is by law implied; and this implication arises quite independently of any charter-party or bill of lading,[1] [*156] which is only evidence of the express contract.(r) Even where the bill of lading stipulates that the goods are to be delivered by the ship-owner to the consignee or his assigns, he or they paying a certain specified sum for freight, and without any reference to a charter-party, no promise to pay freight will be *implied by law* from the receipt of the goods by virtue of the bill of lading, although such receipt will be *evidence* from which a jury may infer a contract to pay in the absence of an express disclaimer of liability. Such a contract may likewise be inferred from former dealings between the parties. But there is no authority for saying that, under the above or similar circumstances, there is a contract *raised by law* to pay the freight, which another, viz., the consignor, has contracted with the ship-owner to pay.(s) This remark seems likewise applicable with respect to the liability of the consignee to demurrage or general average,(t) and will apply a fortiori to cases where the goods are accepted by the consignee without any bill of lading.(u)

197. With respect to freight *pro ratâ itineris*, we shall only observe, that the true principle upon which this description of freight is due, is that a new contract *may be implied to pay it from the acceptance by [*156 a] the consignee of his goods delivered at an intermediate port instead of the destined port of delivery, "to justify a claim for pro rata freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with."(x)

198. The master of a ship has authority not only to borrow money in certain cases on the credit of the owners,(y) but likewise to order such repairs upon their credit as may be fit and proper for his vessel upon her voyage, and the party executing the order may consequently look to them as his security;(z) it is, therefore, necessary to determine who are the owners; for the persons registered as owners will not necessarily be liable as such, the register acts not having been passed for the purpose of rendering them so.(a) "Soon after the passing of those

(r) Domett v. Beckford, 5 B. & Ad. 521;[l] Shepard v. De Bernales, 13 East, 565.

(s) Sanders v. Vanzeller (in error), 4 Q. B. 260;[m] and cases there cited, particularly Coleman v. Lambert, 5 M. & W. 502;[n] Cock v. Taylor, 13 East, 299; Moorsom v. Kymer, 2 M. & S. 303. Bell v. Kymer, 3 Camp. 545. See Amos v. Temperley, 8 M. & W. 798.[o]

(t) Scaife v. Tobin, 3 B. & Ad. 523;[q] Jesson v. Solly, 4 Taunt. 52.

(u) Coleman v. Lambert, 5 M. & W. 502;[n] Wilson v. Kymer, 1 M. & S. 157; Pinder v. Wilks, 5 Taunt. 612;[o] Ward v. Felton, 1 East, 507.

(x) Judgment, Vlierboom v. Chapman, 13 M. & W. 230. 238;[o] Hunter v. Prinsep, 10 East, 394.

(y) Post, s. 200; Arthur v. Barton, 6 M. & W. 138,[o] there referred to, is fully recognized in Johns v. Simons, 2 Q. B. 425;[p] and Stonehouse v. Gent, Id. 431 (a); Williamson v. Page, 1 Carr. & K. 581.[q]

(z) Reeve v. Davis, 1 A. & E. 312. 315;[r] Webster v. Seekamp, 4 B. & Ald. 352;[s] Rich v. Coe, Cowp. 636; Thompson v. Finden, 4 C. & P. 158.[t] The master may likewise hypothecate the ship or cargo for repairs in a foreign port. The Gratitudine, 3 Rob. Adm. R. 240.

(a) Per Littledale, J., Reeve v. Davis, 1 A. & E. 315, 316;[r] Briggs v. Wilkinson, 7 B. & C. 34, 35;[u] Harrington v. Fry, 2 Bing. 179;[x] Per Bayley, J., M'Iver v. Humble, 16 East, 176.

[l]Eng. Com. Law Reps. 27. [m]Id. 45. [n]Id. 23. [o]Id. 1. [p]Id. 42. [q]Id. 47. [r]Id. 26. [s]Id. 6. [t]Id. 19. [u]Id. 14. [x]Id. 9. [o]Reprinted at $2.50 per vol.

acts," observed Lord Tenterden,(*b*) "the leaning of the courts of law in the construction of them was to say, that the registered owners of ships should at all events be liable for the repairs. But the *subject having become more accurately understood, a better and more correct principle now prevails, and the recent cases have decided that the true question in matters of this description is, upon whose credit was the work done. That question would in most cases be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen, that the name of a person may be retained on the registry after he has ceased to be beneficially interested in the ship or to interfere with its concerns." Where, therefore, the defendant's name appeared on the ship's register as part-owner at the time that repairs were done to the ship, but the defendant had previously entered into a contract within the knowledge of the party who ordered the repairs, and who was also a part-owner, and acted as ship's husband, by which she ceased to have any beneficial interest in the ship: it was held, that the defendant was not liable, there being no evidence to show that the plaintiffs, who did the repairs, had any knowledge whatever of the defendant, and the party ordering the repairs having under the circumstances no implied authority to bind the defendant.(*c*) So, where the legal title remained for a month after sale in the vendors, upon the face of the register, and the repairs were ordered(*d*) during that interval by the captain under direction from the vendee, the latter was held liable.(*e*) And where, in assumpsit for goods sold, &c., it appeared that a steam-vessel was *chartered for twelve months, and the charterer bound himself to do all the repairs, except to the engine (which was to be kept in repair by the owners), and acted himself as captain: it was held that, for repairs done under his orders by persons unacquainted with the charter-party, no action lay against the registered owners.(*i*)

[*156 *b*]

[*157]

200. Not only may the master of a ship pledge the owner's credit for needful repairs, but if the vessel be in a foreign port, where the owner has no agent, or if in an English port, distant from the owner's residence, he is likewise authorized to pledge it for such things as are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case; as, for goods supplied or money advanced when necessary; the question of necessity being for the jury.(*k*) And it seems, that the master has also a power, when, in consequence of injury sustained by the ship, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested; but, at all events, the receipt by the owner of the proceeds of such sale, is a sufficient ratification by him of the act of the master in selling her.(*l*)

(*b*) Jennings v. Griffiths, 1 Ry. & M. 42.[y]

(*c*) Curling v. Robertson, 8 Scott, N. R. 12; Stokes v. Carne, 2 Camp. 340; cases supra (*a*).

(*d*) Per Lord Ellenborough, C. J., 2 Camp. 340.

(*e*) Young v. Brander, 8 East, 10. See Briggs v. Wilkinson, 7 B. & C. 30.[a]

(*i*) Reeve v. Davis, 1 A. & E. 312;[b] Frazer v. Marsh, 13 East, 238.

(*k*) See per Lord Abinger, C. B., delivering the judgment in Arthur v. Barton, 6 M. & W. 138;[♦] ante, p. 156 *a* (*y*); Weston v. Wright, 7 M. & W. 396;[♦] Robinson v. Lyall, 7 Price, 592.

(*l*) Hunter v. Parker, 7 M. & W. 322. 341, 342,[♦] throwing doubt on Reid v. Darby, 10 East, 143, contra. As to forwarding goods shipped in a general ship which is unable to complete the voyage in consequence of damage, Shipton v. Thornton, 9 A. & E. 314.[c]

[y] Eng. Com. Law Reps. 21. [a] Id. 14. [b] Id. 28. [c] Id. 36. [♦] Reprinted at $2.50 per vol.

*201. The reason why the master possesses such authority is, that the law, which generally provides for ordinary events, and [*158] not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is, that the law invests the master with power to raise money; and, by an instrument of hypothecation, to pledge the ship itself, if necessary.(m) It is, however, requisite in all these cases to examine with whom the contract was in fact made, and to whom credit was given; for if it appears that the owner or master alone was trusted, he alone will, generally speaking, be liable:(n) the former being liable as principal, and the latter as the party actually contracting, if he do not stipulate against his personal liability, and confine the credit to his owners.(o)

202. It is clearly established, that a servant of the Crown contracting in his official capacity(p) is not personally liable on contracts so entered into; and this rule is grounded on public policy, for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties *thinking themselves aggrieved.(q) Therefore, personal liability does not attach to the governor or commander of a colo- [*159] ny;(r) to the captain of a ship contracting by deed "on account of government;"(s) to a military commissary;(t) or military or naval officer, for supplies furnished for the troops, it not appearing that he had received money from government for their payment, or that he had expressly pledged his personal credit.(u) So, a purser in the navy is not liable to the purser's steward for pay;(x) nor is the secretary at war liable to a retired clerk of the war-office for his retired allowance, although funds have been received by the defendant, in his official capacity, for its payment.(y) Neither will the paymaster of civil services at the Treasury, who has received money for the plaintiff's use, be liable to him in an action for money had and received; at all events, unless the demand for payment be accompanied by a proper authority from the lords commissioners.(z) In like manner, an action for money had *and received will not lie against the receiver- [*160] general for the excise, to recover money received by him as agent

(m) Per Parke, B., Hawtaine v. Bourne, 7 M. & W. 599, 600.♦ As to the right of the master to bind the ship and cargo, see Smith's Merc. Law, 2nd ed. Book III., Chap. 7.

(n) Hoskins v. Slayton, Cas. temp. Hardw. 376; Thomson v. Finden, 4 C. & P. 158,[d] and cases cited in the preceding notes; Thacker v. Moates, 1 M. & Rob. 79.

(o) Per Lord Ellenborough, C. J., Hussey v. Christie, 9 East, 432; Thompson v. Finden, 4 C. & P. 158.[d] (p) See per Ashhurst, J., 1 T. R. 181.

(q) Per Dallas, C. J., Gidley v. Lord Palmerston, 3 B. & B. 286, 287;[e] Per Ashhurst, J., Macbeath v. Haldimand, 1 T. R. 181, 182.

(r) Macbeath v. Haldimand, 1 T. R. 172.

(s) Unwin v. Wolseley, 1 T. R. 674. See Thompson v. Pearce, 1 B. & B. 25;[f] Cunningham v. Collier, 4 Dougl. 233. 235, n. (a).

(t) Lutterloh v. Halsey, cited 1 T. R. 180.

(u) Rice v. Shute, 1 East, 578; Rice v. Everett, Id. 583, n. (a); Myrtle v. Beaver, Id. 135; Prosser v. Allen, Gow, R. 117. See Keate v. Temple, 1 Bos. & P. 158; Priddy v. Rose, 3 Mer. 102. (x) Carter v. Hall, 2 Stark. R. 361.[g]

(y) Gidley v. Lord Palmerston, 3 B. & B. 275.[e]

(z) Rex v. The Lords Commissioners of the Treasury, 4 A. & E. 286. 298.[h] See the judgment in Gibson v. The East India Company, 5 Bing. N. C. 274.[i]

[d] Eng. Com. Law Reps. 19. [e] Id. 7. [f] Id. 5. [g] Id. 3. [h] Id. 31. [i] Id. 35.

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for the Crown, and for the purpose of being paid over to government ;(a) nor against a provisional assignee, for money received by an agent appointed with due care.(b)

203. With respect to the general liability of parliamentary trustees, it has been said, that persons so acting, and stating themselves to be so acting, are not to be held personally liable; but that, as such trustees must know whether there are funds to answer the purpose in view, they act, when contracting with others who do not know, as if representing that they had a fund applicable to the object, and are then personally bound to provide funds to pay the contractors.(c) A party entering into the contract relating to a trust, does not necessarily do so in the character of a trustee; and where the particular act limits his liability on certain contracts specified or contemplated thereby, if entered into in the form which it prescribes, and conformably to its provisions, yet his liability on other contracts, not so contemplated, must accrue according to his own engagement, and the intention of the contracting parties.(d)

204. Therefore, where commissioners, under an inclosure act, were empowered to make a rate to defray the expenses of obtaining the act; and it was enacted that persons advancing money should be repaid out of
[*161] *the first money raised by the commissioners, who, accordingly, drew drafts on their bankers, directing them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account as commissioners: they were held personally responsible to the bankers for advances so made.(z) But where an act directed that the expenses of obtaining it should be paid out of the money to be raised under it, and which had already been raised, in pursuance of the provisions of a previous act, the plaintiff, who sued for such expenses, having failed to show that money had been raised under either of the acts, was nonsuited, the commissioners not being personally liable.(a) Nor are justices of the peace contracting on behalf of the public for rebuilding a public bridge, under the provisions of an act which provides a fund for the payment, liable to the contractor.(b) But parish officers giving promissory notes for money advanced for the use of the parish, and, adding to their signatures the titles of their respective offices, were held to have signed in the character of principals.(c)

205. Since every agent may contract, so as to render himself personally liable,(d) the rule, in cases like the above, seems to depend on the evidence to be submitted to the jury, which will determine to whom credit was in fact given.(e)

[*162] *206. Whether the members of a club, or benefit society, are personally liable for goods ordered, or contracts entered into by their

(a) Atlee v. Backhouse, 3 M. & W. 633. (b) Raw v. Cutten, 9 Bing. 96.[k]
(c) See per Lord Eldon, Higgins v. Livingstone, cited 10 Bing. 287;[l] per Best, C. J., Sprott v. Powell, 3 Bing. 482, 483.[m]
(d) Per Bosanquet, J., Parrott v. Eyre, 10 Bing. 289, 290.[l]
(z) Eaton v. Bell, 5 B. & Ald. 34;[n] Horsley v. Bell, Ambl. 770.
(a) Andrews v. Dally, 4 Bing. 566.[o] (b) Allen v. Waldegrave, 2 Moore, 621.
(c) Rew v. Pettet, 1 A. & E. 196.[p] (d) See per Ashhurst, J., 1 T. R. 181.
(e) Smith's Merc. Law, 2d ed. 120.

[k]Eng. Com. Law Rep. 23. [l]Id. 25. [m]Id. 13. [n]Id. 7. [o]Id. 15. [p]Id. 28.

committee, depends on the general law of principal and agent: this question will, in some cases, be determined by the rules of the club, from which the committee may derive the right of pledging the individual credit of the members ;(*g*) in others by the proof of the defendants having individually authorized the contract,(*h*) through the agency of the committee, or of some particular officer of the club, as by having attended and voted on the committee, in which case it seems that members of the committee so voting would alone be liable.(*i*) Where, however, certain members of the committee of a benefit society signed a contract, into which the committee were not authorized by the rules to enter, they were held not to be liable either as members of the committee, or individually (there having been no plea in abatement,) since it did not appear that a personal responsibility was contemplated by either party.(*k*)

*3. Partners—Corporations—Companies. [*163]

General Rule as to the Joinder of Partners, s. 207. Authority of one Partner to bind his Co-partners, and consequent Liability, ss. 208—210. Mining and other Companies, s. 211. Whether a nominal or a dormant Partner should be joined, ss. 212, 213. When the Liability of a Partner commences, and when it ceases, &c., ss. 214, 215. How a Corporation must be sued, s. 216. How chartered and banking Companies should be sued, s. 217.

207. Partners must be sued jointly, whether they are so generally, or for one particular transaction ;(*q*) and each partner, being considered as the accredited agent of the rest, will bind the firm by his act or assurance made with reference to business transacted by it,(*r*) in the absence of collusion between himself and the other contracting party.(*s*)

208. But a partner cannot bind his copartners by deed, unless he have express authority by deed for that *purpose ;(*t*) and his authority to negotiate bills of exchange or promissory notes by signing in the [*164]

(*g*) Flemyng v. Hector, 2 M. & W. 172, cited per Parke, B., Tredwen v. Bourne, 6 M. & W. 464; Tyrrell v. Woolley, 2 Scott, N. R. 171.

(*h*) Todd v. Emly, 8 M. & W. 505. See Burls v. Smith, 7 Bing. 705 ;[q] Braithwaite v. Skofield, 9 B. & C. 401; Glenster v. Hunter, 5 C. & P. 62 ;[r] Delauney v. Strickland, 2 Stark. R. 416;[s] Bell v. Francis, 9 C. & P. 66.[t]

(*i*) Per Alderson, B., Todd v. Emly, 8 M. & W. 509, 510.

(*k*) Tyrrell v. Woolley, 2 Scott, N. R. 171. 180. See Kerridge v. Hesse, 9 C. & P. 200.[t]

(*q*) Waugh v. Carver, 2 H. Bla. 235; as to what constitutes a partnership generally, 2 Selw. N. P. 10th ed. 1122—1128, and with respect to third persons, Chitt. Contr. 3rd ed. 240—249; Gabriel v. Evill, 1 Car. & Marsh. 358 ;[u] S. C. 9 M. & W. 297.

(*r*) Per Abbott, C. J., Sandilands v. Marsh, 2 B. & Ald. 678; Robinson v. Gleadow, 2 Bing. N. C. 156;[x] Fox v. Clifton, 6 Bing. 792 ;[y] Hawken v. Bourne, 8 M. & W. 703. 710. See the cases, 2 Selw. N. P. 10th ed. 1128—1133; Chitt. Contr. 3rd ed. 249—259; Smith's Merc. Law, 2nd ed. 41.

(*s*) Per Bayley J., Vere v. Ashby, 10 B. & C. 296; Wintle v. Crowther, 1 Cr. & J. 316; Bond v. Gibson, 1 Camp. 185; Lewis v. Reilly, 1 A. & E., N. S., 349.[z]

(*t*) Elliot v. Davis, 2 B. & P. 338; Harrison v. Jackson, 7 T. R. 207; Horsley v. Rush, cited, 7 T. R. 209; Hall v. Bainbridge, 1 Scott, N. R. 151. See Steiglitz v. Egginton, Holt, N. P. C. 141 ;[a] Ball v. Dunsterville, 4 T. R. 313, except, it seems, in the case of a release. Smith's Merc. Law, 2nd ed. 38.

[q]Eng. Com. Law Reps. 20. [r]Id. 24. [s]Id. 3. [t]Id. 38. [u]Id. 41. [x]Id. 29. [y]Id. 19. [z]Id. 41. [a]Id. 3.

name of the firm or in his own name for self and partners, is only implied, and, consequently, that implication may be rebutted by proving express previous notice to the party taking such security.(*u*) So, if the firm be inaccurately described in the instrument, it will be for the jury to decide, whether the deviation was so great as to disentitle the partner to bind the firm; or, whether the style used, though slightly varying from that of the firm, was essentially the same;(*x*) for the law, in such a case, implies no authority to bind the partnership in any other name than that held out to the world as the name of the firm.(*y*) And where a business, to which the indorsement of bills was necessary and incidental, was carried on by trustees for the benefit of creditors in the name of A., who was employed in conducting it, and who likewise carried on a separate business on [*165] his own *account, and was in the habit of getting his bills indiscriminately discounted by the plaintiff: it was held, that A.'s indorsement on certain bills discounted after he had ceased to carry on such separate business was primâ facie the indorsement of the trustees, and that the onus lay upon them to shew that the indorsements were made upon account of the separate business.(*z*)

208 *a*. The right, however, of one partner to bind the firm by bill of exchange or promissory note, is confined to trading copartnerships, this being the usual course in mercantile transactions, and the authority being established by the custom and law of merchants, which is part of the general law of the land. The same reason, however, does not apply to other partnerships. There is, for instance, no custom nor usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business.(*a*) Neither will a guarantie given by an attorney be binding on his copartner, in the absence of proof of knowledge or privity on the part of the latter, and there being no evidence to show that the guarantie was given in pursuance of the ordinary practice of the parties.(*b*) Where issue is joined on a plea of Non Accepit, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, though the defendants shew that this signature was a fraudulent act on the part of [*166] *such partner, yet if the proof does not affect the plaintiff with knowledge of the fraud that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction.(*c*)

209. In the particular case of a joint-stock company, the right of one director of the company, to draw a bill upon the rest; and, still further, the power of one director to accept a bill for himself and the others, so as to

(*u*) Lord Gallway v. Mathew, 10 East, 264; Pinkney v. Hall, 1 Salk. 146: Faith v. Richmond, 11 A. & E. 339;[b] Williamson v. Johnson, 1 B. & C. 146;[c] Duncan v. Lowndes, 3 Camp. 478; Jones v. Corbett, 11 Law Journ., N. S., Q. B. 181. See Thickness v. Bromilow, 2 Cr. & J. 425. When one partner may or may not bind the firm by his own signature, ante, ss. 184. 187; and see Siffkin v. Walker, 2 Camp. 308.

(*x*) Faith v. Richmond, 11 A. & E. 339. 342.[b] See per Rolfe, B., Kirk v. Blurton, 9 M. & W. 289. (*y*) Id.

(*z*) Furze v. Sharwood, 2 Q. B. 388.[d] See Wilkes v. Hopkins, 1 C. B. 737.

(*a*) Hedley v. Bainbridge, 3 Q. B. 316, 321;[e] Levy v. Pyne, Car. & M. 453.

(*b*) Haselham v. Young, 5 Q. B. 833.[f]

(*c*) Per Lord Denman, C. J., Musgrave v. Drake, 5 Q. B. 186, 187.[g]

[b]Eng. Com. Law Reps. 39. [c]Id. 8. [d]Id. 42. [e]Id. 43. [f]Id. 48. [g]Id. 48.

make those others liable, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect.(*d*) The mode in which a contract may be entered into, and a bill of exchange or promissory note made, accepted or indorsed on behalf of a joint-stock company, within the provisions of the 7 & 8 Vict. c. 110, is pointed out in the 44th and 45th sections of that Act. The 46th section requires, that all deeds and instruments bearing the seal of the company shall be signed by two at least of the directors of the company.

*210. With respect to liability,(*e*) the general rule is, that as between a creditor and the partners, all the latter are liable for the whole debt, though as between the partners themselves each is only answerable for his respective share;(*f*) nor can this liability, with respect to third persons, be affected by any arrangement amongst the partners, unless notice of such arrangement be duly given,(*g*) or unless it appear to be the intention of the parties sought to be charged, to contract separately and not jointly.(*h*) Where, however, it was sought to charge several persons as partners in an undertaking, upon a contract entered into with one only, it is often very material to look to the terms of any agreement existing between the parties themselves, in order to establish the fact of the partnership, to shew that the contract declared on was made on its behalf,(*i*) and thus to avoid the consequences of a misjoinder.(*k*) [*167]

211. The general rules respecting the liability of partners apply to public companies instituted for mining and other purposes, but not regulated by statute or charter. Such companies are in fact trading partnerships, and the shareholders will be liable accordingly. In these *cases, it is, however, necessary to distinguish between acts done by the company in furtherance and execution of their project, and acts done by those who hold meetings and enter into contracts preliminary to the formation of the company; for where an individual, by prospectus or circular, has signified his intention to become a member when a certain amount of capital has been subscribed, or when certain arrangements antecedent to the formation of the company have been carried out, it will be incumbent on a tradesman who has supplied goods on the credit of the company, and who seeks to charge that individual with liability, to shew that the advertised amount of [*168]

(*d*) Brahmah v. Roberts, 3 Bing. N. C., 963;[h] Dickinson v. Valpy, 10 B. & C. 128;[i] Bult v. Morrell, 12 & E. 745;[k] Fox v. Firth, 10 M. & W. 131;[l] Philipson v. The Earl of Egremont, 6 Q. B. 587.

(*e*) Liability on fi. fa. against one of two partners. See Johnson v. Evans, 7 Scott, N. R., 1035. 1044; Garbett v. Veale, 5 Q. B. 408.[l]

(*f*) Per Lord Kenyon, C. J., Wright v. Hunter, 1 East, 30.

(*g*) Per Le Blanc, J., Hudson v. Robinson, 4 M. & S. 482; Per Lord Ellenborough, C. J., Rex v. Dodd, 9 East, 527; Byers v. Dobey, 1 H. Bla. 236; Hawken v. Bourne, 8 M. & W. 703. 710.[♦]

(*h*) Gibson v. Lupton, 9 Bing. 297.[m] (*i*) Wilson v. Whitehead, 10 M. & W. 503.[♦]

(*k*) See Robeson v. Ganderton, 9 C. & P. 476.[n]

[h]Eng. Com. Law Reps. 32. [i]Id. 21. [k]Id. 48. [l]Id. 40. [m]Id. 23. [n]Id. 38.

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capital has been subscribed, and that the company has been established in accordance with the plan announced. It seems clear, both from decided cases and from the rules of construction applicable to written instruments, that he will not be at liberty to separate the statement in the prospectus that the party means to be a shareholder from the accompanying statement, that no company is to exist till certain conditions precedent have been complied with.(*l*)

211 *a*. Where, however, persons meet together in order to prepare the means necessary for calling a public company into existence, attendance at such meeting, and concurrence in the measures there adopted for the object proposed, will be strong evidence that the individual so attending and taking part in the proceedings has held himself out as a paymaster to those who [*169] might execute orders given during the formation of *the company, and has authorized contracts with those whose services might be required by the then constituent body.(*m*)

211 *b*. In the prospectus of a proposed association the names of two persons (the defendants) appeared as president and vice-president respectively, and these parties signed their name to a document by which they agreed to subscribe for a certain number of shares each, and to pay a certain deposit thereon when shares to the amount of 50,000*l*. should have been taken. The required amount of shares was never subscribed for, and the defendants attended two meetings, but did no other act to identify themselves with the company. In an action for work and labour alleged to have been performed for the association at the request of the secretary, it was held in accordance with the preceding remarks, that the proper questions for the jury were: (1) whether or not there had been any direct contract entered into by the defendants with the plaintiff; (2) whether there was any partnership formed, of which the defendants were members; (3) whether the defendants had held themselves out to the world or to the plaintiff as partners in the concern.(*n*)

211 *c*. Where a prospectus has been issued previous to the formation of a mining or other trading company, and the company has begun to act *as such*, notwithstanding the non-fulfilment of the conditions precedent set [*170] forth in the prospectus, the liability or non-liability *of a shareholder in the concern will depend upon whether he has either expressly or impliedly assented to the proceedings of the directors or managing body, and thus waived the exact fulfilment of the terms of the contract by which he undertook to become a member of the company. The mere fact that a shareholder in the concern has been misled by a report of the directors stating that the formation of the company has been completed according to the terms of the prospectus, will not suffice to exonerate him from liability if he possessed, by access to the company's books or other-

(*l*) Lake v. The Duke of Argyll, 6 Q. B. 478, 479; Fox v. Clifton, 6 Bing. 779;° S. C., 9 Bing. 115;ᵖ Pitchford v. Davis, 5 M. & W. 2.♦

(*m*) Judgment, 6 Q. B. 478, 479; Bell v. Francis, 9 C. & P. 66;ᵍ Kerridge v. Hesse, Id. 200.

(*n*) Wood v. The Duke of Argyll, 7 Scott, N. R., 885.

°Eng. Com. Law Reps. 19. ᵖId. 23. ᵍId. 38. ♦Reprinted at $2.50 per vol.

wise, the means of ascertaining and testing the accuracy of the statements put forth by the directors.(*o*)

211 *d*. Where the company has been completely formed, and is not inchoate merely, at the date of the particular contract declared upon, a member having constituted himself a partner in the concern will be bound by the contracts of the directors as to all matters within the scope of the partnership dealings, and necessary or incidental to the carrying on the business of the company. Any restriction, moreover, which by agreement amongst the partners is attempted to be imposed, upon the authority which one possesses as a general agent for the others, is operative only as between the partners themselves, and does not limit such authority with reference to third persons who may acquire rights by its exercise, unless they can be proved to have known that such restriction has been made.(*p*) In an action against a person charged as a partner in a mining company, but who is not shewn to have contracted personally, or to have represented himself to the plaintiff as a partner, the fact of his having been a partner may nevertheless be shown by evidence short of strict proof that he has executed the deed of copartnership, or was at the date of the contract legally interested in the mine.(*q*) [*171]

211 *e*. In the sections immediately preceding, we have briefly stated the liability which attaches at *common law* to the members of a trading company, whether inchoate or completely formed. It must be observed, however, that the recent statute, 7 & 8 Vict. c. 110, contains stringent provisions for the regulation of all joint-stock companies enumerated in its second section; and in determining as to the liability of a shareholder in any specified undertaking, it will in the first place be necessary to ascertain whether the particular undertaking falls within the operation of this statute. Those portions of the above important enactment which have a direct bearing upon our present subject will be separately considered in the Appendix, for which will likewise be reserved some remarks respecting the liability of parties engaging in the formation of railway companies. [*172]

212. A nominal partner who lends his name to a firm becomes, as against all the rest of the world, a partner, on principles of general policy, and to prevent credit being fraudulently obtained; and liability attaches, though the party, ostensibly a partner, never had, or has ceased to have, any interest in the partnership concern.(*r*) This rule applies whenever a person holds himself out as a partner, unless, perhaps, where the party contracted

(*o*) Steigenberger v. Carr, 3 Scott, N. R., 466.[†]

(*p*) Per Parke, B., delivering the judgment of the court, Hawken v. Bourne, 8 M. & W. 709, 710;[♦] Steigenberger v. Carr, 3 Scott, N. R., 466; Tredwen v. Bourne, 6 M. & W. 461, 463;[♦] Fox v. Clifton, 6 Bing. 776;[r] S. C., 9 Bing. 115;[s] Pitchford v. Davis, 5 M. & W. 2,[♦] cited 8 M. & W. 707, 708;[♦] Beech v. Eyre, 6 Scott, N. R., 327; Harrison v. Heathorn, 6 Scott, N. R., 735; Bradley v. Eyre, 11 M. & W. 432;[♦] Clowes v. Brettell, Id. 461; Dickinson v. Valpy, 10 B. & C. 128;[t] Doubleday v. Muskett, 7 Bing. 110;[u] Brooks v. Stuart, 9 A. & E. 854.[x]

(*q*) Ralph v. Harvey, 4 Q. B. 845;[a] as to Vice v. Lady Anson, 7 B. & C. 409,[b] see 3 Scott, N. R., 471, 472.

(*r*) Per Eyre, C. J., Waugh v. Carver, 2 H. Bla. 246; M'Iver v. Humble, 16 East, 174; Smith v. Watson, 2 B. & C. 411;[c] Vere v. Ashby, 10 B. & C. 188. 296.[d]

[†]Eng. Com. Law Reps. 19. [r]Id. 23. [s]Id. 21. [t]Id. 20. [u]Id. 36. [x]Id. 45. [a]Id. 14. [b]Id. 9. [c]Id. 21. [d]Reprinted at $2.50 per vol.

with was not aware of such holding out at the time of contracting,(*s*) or where he had notice of the real circumstances of the case.(*t*)

213. If a firm contain dormant partners, the plaintiff contracting with the ostensible partners may sue the latter only on any implied contract; though, if he subsequently discover the dormant partners, he may join them or not at his election: and if he do not join them, it will be for the ostensible partners to shew, that the plaintiff trusted the entire firm.(*u*) Where, however, goods were supplied to defendant, who carried on business under the firm of B. & Co., and the invoice of the *goods in question was made out to B. & Co.: it was held, the defendant having pleaded in abatement and having proved that he was really in partnership with C., that the action would not lie against him alone, in the absence of proof either that he was solely liable, or that he had represented himself to be so.(*x*) The above rule, moreover, as to the joinder of a dormant partner, applies to written as well as to verbal contracts; and, therefore, a dormant partner may be joined as a co-defendant, on a written agreement entered into and signed by his copartners, but to which he was himself no party;(*y*) and it will be for such dormant partner to shew, that the contract declared on was with the partners who signed it, and with them alone, whereas it will be for the plaintiff to shew, that the ostensible partners meant to pursue the implied authority of the dormant partner, and meant to contract on behalf of him, and of themselves, in order to render the partnership liable.(*z*) A dormant partner, on ceasing to be connected with the firm, ceases to be liable, except to *such as knew him to be a partner at the time of contracting; and though notice of his retirement must be given to these parties, no others are entitled to it.(*a*)

[*172 *a*]

[*172 *b*]

214. The liability of a partner commences from the time of his admission into the firm; but he is not bound by a bill of exchange subsequently accepted, without his assent, for a debt due prior to such admission;(*b*) and an agreement that the incoming partner should be considered as partner from a period previous to the date of the agreement, is a bargain between the immediate parties thereto, but does not operate as a pledge of the credit

(*s*) Per Parke, J., Dickinson v. Valpy, 10 B. & C. 140;[e] Shott v. Strealfield, 1 Moo. & Rob. 9; but see Young v. Axtell, cited 2 H. Bla. 242.

(*t*) Alderson v. Pope, 1 Camp. 404, n. (*a*); Fox v. Clifton, 6 Bing. 776,[f] and 9 Bing. 118;[g] Minnit v. Whiteny, 5 Bro. P. C. 489.

(*u*) Per Parke, J., De Mautort v. Saunders, 1 B. & Ad. 401;[h] Wintle v. Crowther, 1 Cr. & J. 316; Ex parte Hamper, 17 Ves. 403; Per Tindal, C. J., delivering the judgment in Ex parte Chuck, 8 Bing. 471;[i] Saville v. Robertson, 4 T. R. 725; Lloyd v. Ashby, 2 B. & Ad. 23;[k] Stansfeld v. Levy, 3 Stark. R. 8.[l]

(*x*) Bonfield v. Smith, 12 M. & W. 405,♦ recognizing De Mautort v. Saunders, 1 B. & Ad. 401.[m]

(*y*) Drake v. Beckham, (in error,) 11 M. & W. 315,♦ affirming S. C., 9 M. & W. 79;♦ and virtually overruling Beckham v. Knight, 4 B. N. C. 243,[n] affirmed on a point of pleading, 1 Scott, N. R., 675. See also Latch v. Wedlake, 11 A. & E. 959.[o]

(*z*) 9 M. & W. 93. 97.♦

(*a*) Per Patteron, J., Heath v. Sansom, 4 B. & Ad. 177;[p] Evans v. Drummond, 4 Esp. 89; Carter v. Whalley, 1 B. & Ad. 11;[q] Farrar v. Deflinne, 1 Car. & K. 580.[r]

(*b*) Shirreff v. Wilks, 1 East, 48; 2 Selw. N. P. 10th ed. 1129; Wilson v. Lewis, 2 Scott, N. R. 115.

[e]Eng. Com. Law Reps. 21. [f]Id. 19. [g]Id. 23. [h]Id. 20. [i]Id. 21. [k]Id. 22. [l]Id. 14. [m]Id. 20. [n]Id. 33. [o]Id. 39. [p]Id. 24. [q]Id. 20. [r]Id. 47.

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of the new partner, in dealings with strangers before he actually became such;(c) but if the partnership has, in fact, commenced, the mere circumstance of the partnership deed not being executed till a subsequent day, is immaterial.(d)

215. The liability of a retiring partner ceases on the dissolution of the firm, accompanied by due notice thereof, or by proof of the creditor's knowledge of the fact;(e) but he still remains responsible on previous *engagements, unless the creditor has ever expressly or impliedly [*172 c] agreed to the substitution of the credit of a new firm, for that of the old; and the onus of proving such an agreement, or shewing that it must necessarily be inferred from the knowledge and conduct of the creditor, lies on the parties originally liable.(f) There are, however, cases, in which a retiring partner will remain liable; as, if he give authority by parol to the continuing partner, to indorse bills in the partnership name;(g) or if a bill of exchange, drawn in blank by a deceased partner in the name of the firm, be filled up and circulated by a clerk of the surviving partners, under a date prior to the drawer's death.(h) When a partnership is dissolved by the death of one of its members, the legal liability survives exclusively against the remaining partners:(i) consequently, a debt due to the defendant as surviving partner, may be set off against a debt due from him in his own separate character;(k) *and it is never necessary to declare [*172 d] against a surviving partner as such—he may be sued as having solely contracted.(l) Where one partner is discharged from liability by his bankruptcy and certificate, or under an insolvent act, such bankruptcy and certificate, or discharge under the insolvent act, may now be replied to a plea in abatement of the non-joinder.(m)

216. A corporation must be sued on a contract in its corporate name, the remedy being against the property belonging to the corporation only, and not against that of the individual members.(n) The general rule, moreover, being that a corporation aggregate can only contract under its common seal, the exception to that rule is where the subject-matter of the contract is

(c) Per Bayley, J., Vere v. Ashby, 10 B. & C. 296, 297.[a]
(d) Battley v. Bailey, 1 Scott, N. R. 143.
(e) Hart v. Alexander, 2 M. & W. 484; Newsome v. Coles, 2 Camp. 617; Parkins v. Carruthers, 3 Esp. 248; Graham v. Hope, Peake, R. 154.
(f) Hart v. Alexander, 2 M. & W. 484; Dobbin v. Foster, 1 Car. & K. 323;[t] Kirwan v. Kirwan, 2 Cr. & Mee. 617; Thompson v. Percival, 5 B. & Ad. 925;[u] Thomas v. Shillibeer, 1 M. & W. 124; Bedford v. Deakin, 2 B. & Ald. 210; and see Blew v. Wyatt, 5 C. & P. 397;[x] and the observations of Denman, C. J., 5 B. & Ad. 933,[u] on Lodge v. Dicas, 3 B. & Ald. 611,[y] and David v. Ellice, 5 B. & C. 196.[z]
(g) Smith v. Winter, 4 M. & W. 454.
(h) Usher v. Dauncey, 4 Camp. 97. See Abel v. Sutton, 3 Esp. 108; Lewis v. Reilly, 1 Q. B. 349.[b]
(i) Calder v. Rutherford, 3 B. & B. 302;[c] Richards v. Heather, 1 B. & Ald. 29. 522; Osborne v. Crosbern, Sid. 238.
(k) Slipper v. Stidstone, 5 T. R. 493.
(l) Chitt., junr., Pleading, 152, n. (d); Richards v. Heather, 1 B. & Ald. 29.
(m) 3 & 4 Will. 4, c. 42, s. 9.
(n) Edmunds v. Brown, 1 Lev. 237; Per Lord Tenterden, C. J. Jefferys v. Gurr, 2 B. & Ad. 841;[d] Bac. Ab. Corporations, (E. 2). See Pontent v. The Basingstoke Canal Company, 3 Bing. N. C. 443;[e] Beverley v. The Lincoln Gas Light and Coke Company, 6 A. & E. 829.[f]

[a]Eng. Com. Law Reps. 21. [t]Id. 47. [u]Id. 27. [x]Id. 24. [y]Id. 5. [z]Id. 11. [b]Id. 41. [c]Id. 5. [d]Id. 22. [e]Id. 32. [f]Id. 33.

of trivial importance and frequent occurrence, or immediate urgency and essential to carrying on the business of the corporation; in any such matter, necessity, or convenience amounting almost to necessity, requires that the corporate body should be able to bind itself by simple contract, either express or implied.(o) Where, therefore, the guardians of a union verbally directed their officer to have gates made for the union workhouse, and the plaintiff, in pursuance of orders from the officer, furnished the gates, which were erected; the jury having found that the work done was for things necessary for the purposes for which the defendants were incorporated, and the contract having been adopted by them, the Court refused to disturb the verdict.(p) Where, however, the board of guardians of the Strand Union, contracted under seal with the plaintiff to make a survey and map of the parish of C., as ordered by the Poor Law Commissioners, under the provisions of the 6 & 7 W. 4, c. 96, s. 3, and they were made accordingly, and subsequently an order not under seal was given by the defendants to the plaintiff to execute a reduced plan as a key to the larger plan: it was held, that the plaintiff could not recover against the defendants in respect of this reduced plan, the making of the plan not being in any way incident to the purposes for which the defendants were incorporated, so as to dispense with the necessity of contracting for it under seal.(q)

[*172 e]

[*172 f]

*216 a. The principle on which is founded the exception to the general rule respecting the mode in which a corporation may contract "appears," as observed by Lord Denman, C. J., in a recent case,(r) "to be convenience amounting almost to necessity. Wherever, to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. On the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon." With reference to the liability of a corporate body upon a bill of exchange, we may observe, that wherever a body so constituted can become a party to such an instrument, or wherever an Act of Parliament expressly or impliedly authorises a corporation to draw and accept bills, the holder thereof has the same remedy against the body corporate as he would have in such a case against a private indi-

(o) Hall v. The Mayor, &c., of Swansea, 5 Q. B. 526. 546;[g] Hartnell v. The Thames Haven Dock and Railway Company, cited 5 Scott, N. R. 764; Judgment, Arnold v. The Mayor of Poole, 5 Scott, N. R. 775, cited arg. Reg. v. The Town Council of Lichfield, 4 Q. B. 904;[h] Tilson v. The Warwick Gas Light Company, 4 B. & C. 962;[i] De Grave v. The Mayor and Corporation of Monmouth, 4 C. & P. 111;[k] Dunston v. The Imperial Gas Light and Coke Company, 3 B. & Ad. 125;[l] Carden v. The General Cemetery Company, 5 B. N. C. 253;[m] Reg. v. The Hull and Selby Railway Company, 6 Q. B. 70.

(p) Sanders v. The Guardians of the St. Neots Union, 15 L. J., N. S., M. C., 104.

(q) Paine v. The Guardians of the Poor of the Strand Union, 15 L. J., N. S., M. C., 89.

(r) Church v. The Imperial Gas Light and Coke Company, 6 A. & E. 846,[n] recognised in The Mayor of Ludlow v. Charlton, 6 M. & W. 822.[♦]

[g] Eng. Com. Law Reps. 48. [h] Id. 45. [i] Id. 10. [k] Id. 19. [l] Id. 23. [m] Id. 35. [n] Id. 33.
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vidual.(s) Where, however, a cemetery company, by their act of *incorporation were empowered to "make contracts and bargains touching the undertaking," and to "do and transact all other matters and things which shall be requisite to be done and transacted for the direction and management of the officers of the said company and the said directors," and the Act provided that on such contracts the directors should not be personally liable: it was held, that it was quite foreign to the purposes and unnecessary to the constitution of such a company to give bills of exchange, and that the directors were therefore personally liable on a bill accepted by them on account of a debt due from the company.(t) Churchwardens and overseers of the poor, though by statute they may be for some purposes a corporation, have no common seal whereby to bind themselves: and if they covenant "for themselves and for their successors, churchwardens and overseers," they will be personally bound.(u) [*172 g]

217. By stat. 1 Vict. c. 73, the crown is empowered to grant letters-patent to any trading or other company established under the provisions of that act, directing that such company shall be sued in the name of one of the officers for the time being appointed to sue and be sued on its behalf; and likewise to declare and provide, that the members of such company shall be individually liable to such extent only per share as shall be declared and limited by such letters-patent.(x) And *by the stat. 8 & 9 Vict. c. 16, s. 97, a joint-stock company may be sued upon any contract entered into under the provisions of that act.(y) [*172 h]

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*CHAPTER III. [*173]

HUSBAND AND WIFE—INFANT, &c.

When the Husband must be sued alone, ss. 218—220. When the Wife may be sued alone—General Rule and Exceptions, ss. 221—223. When the Husband may be sued alone or jointly with his Wife, s. 224. When the Husband and Wife must be sued jointly, ss. 225, 226. Infant, Non Compos Mentis, &c. ss. 227, 228.

218. The legal effect of marriage is to render the wife incompetent to contract except as the agent of her husband and by his authority, either express or implied;(a) and on this principle she has been held not liable for necessaries supplied after the death of the husband, who was abroad, but

(s) Murray v. The East India Company, 5 B. & Ald. 204. 210;[o] Broughton v. Manchester and Salford Waterworks Company, 3 B. & Ald. 1;[p] Stark v. Highgate Archway Company, 5 Taunt. 792.[q]

(t) Steele v. Harmer, 15 L. J., N. S., Exch., 217.

(u) Furnivall v. Coombes, 6 Scott, N. R. 522. (x) Sects. 3, 4.

(y) See the Appendix. As to Actions against a banking copartnership, see 7 & 8 Vict. c. 113, s. 8; ante, s. 93; and the Appendix.

(a) Co. Litt. 112 a; Com. Dig. Bar. & Feme (D. 1); Per Blackstone, J., Stevenson v. Hardie, 2 W. Bla. 873.

[o] Eng. Com. Law Reps. 7. [p] Id. 5. [q] Id. 1.

ordered in ignorance of that event.(*b*) The husband must, then, as a general rule, be sued alone on any cause of action ex contractu accruing during coverture through the act of the wife.(*c*) Hence, a declaration against the husband for money lent to the wife must allege the request by the former, [*174] and not by the latter.(*d*). So, a declaration in assumpsit, *laying the promise by a feme covert, is bad, for quoad the wife the promise is void;(*e*) but where, in such a case, the promise is alleged to have been made by the defendants, of whom one was a married woman sued jointly with her husband, but was not stated to have been made before her coverture, and the defence was a plea in abatement of the non-joinder of other parties: the court refused to arrest the judgment, the ambiguity in the declaration being aided by the plea.(*f*) Even if the cause of action accrued against the wife, dum sola, in which case she would be rightly joined, the promise cannot be laid by her during coverture.(*g*)

219. Where the husband, for some new and valid consideration, charges himself in writing(*h*) with debts due from the wife, dum sola, or with the performance of contracts then entered into by her, he must be sued alone on such undertaking; though, on the original debt or contract, the remedy would have been against both;(*i*) but the precedent moral obligation will not *alone* suffice to raise an implied promise by the husband so as to render him liable;(*k*) there must be some further consideration, as forbearance after marriage.(*l*)

[*175] *220. If the husband survives, he is not liable to be sued otherwise than as administrator to his wife, on any contract made with her, or for any debt incurred by her anterior to the marriage;(*n*) but on those entered into subsequently, as for rent accruing during coverture under a lease to the wife dum sola,(*o*) or to husband and wife,(*p*) or on a judgment recovered against both,(*q*) the husband will remain liable; and the general rule, in this case, seems to be, that where an action would lie against the husband alone, during the wife's lifetime, such action will well lie against the husband surviving, and his personal representatives.(*r*)

(*b*) Smout v. Ilbery, 10 M. & W. 1.♦ As to the husband's liability for necessaries, see Lane v. Ironmonger, 13 M. & W. 368;[r] Freestone v. Butcher, 9 C. & P. 643;[s] Edwards v. Towels, 6 Scott, N. R. 641; Manby v. Scott, 1 Lev. 4, S. C. 1 Sid. 109.

(*c*) Viner Ab. Bar. and Feme (U.), (X), pl. 21.

(*d*) Stone v. Macnair, in error, 7 Taunt. 432;[t] Stevenson v. Hardie, 2 Bla. R. 872; Ross v. Noel, Bull. N. P. 136. See Nurse v. Wills, 4 B. & Ad. 739,[u] affirmed in error; 1 A. & E. 65;[v] Risley v. Stafford, Palm. 312.

(*e*) Pittam v. Foster, 1 B. & C. 259, 252.[x] (*f*) France v. White, 1 Scott, N. R. 604.

(*g*) Morris v. Norfolk, in error, 1 Taunt. 212; post, s. 225. (*h*) 29 Car. 2, c. 3, s. 4.

(*i*) Drue v. Thorn, Aleyn, 72. See arg., Mitchinson v. Hewson, 7 T. R. 348; post, s. 225.

(*k*) Beaument v. Reeve, 15 L. J., N. S., Q. B., 141, which is confirmatory of Eastwood v. Kenyon, 11 A. & E. 438.[y]

(*l*) Per Lord Denman, C. J., Eastwood v. Kenyon, 11 A. & E. 438. 451;[z] Fabian v. Plant, 1 Show. 183; Heard v. Stanford, Cas. Temp. Talbot, 173.

(*n*) Arg. Mitchinson v. Hewson, 7 T. R. 350; Com. Dig. Bar. and Feme, (2 C.); Smith v. Johns, Cro. Jac. 257; Woodman v. Chapman, 1 Camp. 189, n.

(*o*) Payne v. Minshal, T. Raym. 6, S. C. 1 Lev. 25; Roll. Ab. 351, (G.); Woodfall, L. & T. 4th ed. 579. (*p*) Com. Dig. Bar. and Feme, (2 B.)

(*q*) Mounson v. Bourn, Cro. Car. 518; Woodyer v. Gresham, 1 Salk. 116; Com. Dig. Bar. and Feme, (2 B.) (*r*) See ss. 224, 225.

[r] Eng. Com. Law Reps. 38. [s] Id. 2. [t] Id. 22. [u] Id. 28. [x] Id. 8. [y] Id. 39. [z] Id. 39.

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221. A feme covert cannot be sued alone, even if divorced à mensâ et thoro for adultery, and in the receipt of a competent allowance for her maintenance ;(*s*) nor can she, if a sole trader in the city of London, be sued as such in the courts at Westminster, and even in the city courts the husband should be joined for conformity ;(*t*) and the plea of coverture is available to the personal representatives of a feme covert, as well as to herself:(*u*) and the only exceptions to this rule are, in case of the husband's banishment, abjuration of the realm, or death in law, or presumption of [*176] law, or in the event of the marriage being dissolved by a divorce à vinculo matrimonii,(*x*) or being pronounced void ab initio.(*y*) Transportation for life or a term of years, is tantamount to permanent or temporary civil death.(*z*)

222. Analogous to the case of a person transported is that of an alien enemy who cannot lawfully reside in England ;(*a*) though, it seems, that the wife of an alien ami who has never been in this kingdom cannot be sued as a feme sole ; at all events, it will be necessary to prove, that she represented herself as such, or that the plaintiff dealt with her believing her to be such ;(*b*) and even with evidence to this effect, the action will fail if it appears that the husband once lived here, though resident abroad many years anterior to the contract declared on :(*c*) and if the husband, being a subject of the crown, abscond, and reside in a foreign land, it is [*177] clear that the wife cannot be sued alone, though she obtained credit as a feme sole.(*d*)

223. If the wife survive she may be sued on all causes of action which accrued prior to her coverture ;(*e*) but the husband's bankruptcy and certificate, or his discharge under the insolvent act, will release her from all debts contracted before marriage, which are provable under the commission.(*g*) If there be a joint lease to husband and wife, the wife cannot disagree to it during the life of her husband, and if she acquiesce after his death she will be liable for all arrears of rent which accrued during his lifetime ; but it is said, that if there be any special covenants inserted in the lease, she is not bound by them after the death of her husband,

(*s*) Lewis v. Lee, 3 B. & C. 291 ;[a] Marshall v. Rutton, 8 T. R. 545 ; Faithorne v. Blaquire, 6 M. & S. 73.

(*t*) Beard v. Webb, 2 B. & P. 93. (*u*) Clayton v. Adams, 6 T. R. 604.

(*x*) Co. Litt. 133, a. ; 1 Bla. Com. 443 ; Bac. Ab. Bar. and Feme, (M.) ; Per Abbott, C. J., Lewis v. Lee, 3 B. & C. 297 ;[b] Marshall v. Rutton, 8 T. R. 548 ; Per Blackstone, J., Hatchett v. Baddeley, 2 W. Bla. 1082 ; Per Tindal, C. J., Williamson v. Dawes, 9 Bing. 295 ;[c] ante, ss. 99, 100. (*y*) Anstey v. Manners, 1 Gow, R. 10.[e]

(*z*) Sparrow v. Carruthers, cited 2 W. Bla. 1197 ; Ex parte Franks, 7 Bing. 762,[d] and cases there cited ; ante, s. 100.

(*a*) Per Parke, B., Barden v. De Keverberg, 2 M. & W. 65 ; Derry v. Dutchess of Mazarine, 1 Lord Raymond, 147.

(*b*) Barden v. De Keverberg, 2 M. & W. 61 and 64—per Parke, B.

(*c*) Stretton v. Busnach, 1 Bing. N. C. 139,[f] and the cases there cited ; Kay v. De Pienne, 3 Camp. 123.

(*d*) Williamson v. Dawes, 9 Bing. 292 ;[g] Marsh v. Hutchinson, 2 B. & P. 231, 232 ; Farrar v. Countess of Granard, 1 B. P. N. R. 80.

(*e*) Mitchinson v. Hewson, 7 T. R. 348. 350 ; Woodman v. Chapman, 1 Camp. 189.

(*g*) Lockwood v. Salter, 5 B. & Ad. 303,[h] recognizing Miles v. Williams, 1 P. Wms. 249, and In re M'Williams, 1 Sch. & Lef. 169, and observing on Sparkes v. Bell, 8 B. & C. 1.[i]

[a]Eng. Com. Law Reps. 10. [b]Id. 10. [c]Id. 23. [d]Id. 20. [e]Id. 5. [f]Id. 27. [g]Id. 23. [h]Id. 27. [i]Id. 15.

although she continues tenant by force of the demise.(*h*) Where goods were supplied to a feme covert, living apart from her husband, for which, subsequently to his death, she promised to pay; it was held that, as the price of the goods originally constituted a debt from the husband and not from the defendant, the declaration did not disclose any sufficient consideration for the promise alleged:(*i*) and where, in an [*178] *action for goods sold and delivered, to a plea of coverture plaintiff replied a promise by defendant after her husband's death; the court decided that no consideration appeared for the promise in the replication, that such promise was distinct from that declared on, and that the replication was consequently a departure.(*k*) On the same grounds a promissory note given by a married woman is absolutely void, nor would she be rendered liable by a promise of payment, in consideration of forbearance, subsequently to the husband's death;(*l*) but an indorsement by a married woman, whether made in her own or her husband's name, provided she were duly authorized by him, or if such authority could be presumed, will convey a good title to the indorsee.(*m*)

224. An action will lie in the following cases, either against husband and wife jointly, or husband alone—debt for rent due after marriage, under a lease to wife dum sola, or under a lease which the wife has as executrix or administratrix.(*n*) So, debt or covenant, it seems, will lie for rent or [*179] breaches of the covenants in a lease to *husband and wife jointly for the wife's benefit;(*o*) and an action of covenant was held to lie against husband and wife, on a warranty made by them jointly annexed to an estate for years in a fine.(*p*) So, husband and wife may be sued jointly in debt for double the yearly value of premises demised to the wife, who had notice, before coverture;(*q*) nor was it held necessary, in such a case, to give notice to the husband subsequently to the marriage.(*r*)

225. For breaches of the wife's contracts committed, or debts incurred before marriage, as for rent then due under a demise to her, the rule is, that husband and wife must be jointly sued; and this holds if the contract were entered into by the wife before marriage, but broken subsequently, though the promise must be laid by the wife whilst unmarried;(*s*) and

(*h*) Woodfall, L & T. 4th ed. 36, 37; 2 Wms. Saund. 180, n. (9). See Wotton v. Hele, 2 Saund. R. 177.

(*i*) Littlefield v. Shee, 2 B. & Ad. 811,[k] distinguishing v. Muggeridge, 5 Taunt. 36;[l] the authority of which latter case is shaken by the judgment in Eastwood v. Kenyon, 11 A. & E. 449, 450.[m] See Smith v. Johns, Cro. Jac. 257.

(*k*) Meyer v. Haworth, 8 A. & E. 467.[n]

(*l*) Lloyd v. Lee, 1 Stra. 94.

(*m*) Barlow v. Bishop, 1 East, 432; Prestwick v. Marshall, 7 Bing. 565;[o] Cotes v. Davis, 1 Camp. 485.

(*n*) Com. Dig. Bar. and Fem, (Y.); 1 Roll. Ab. 349, pl. 45. 50. Covenant on a demise to wife whilst sole, the breach being during coverture, was held to lie against husband and wife. Anon., 6 Mod. 239. As to the remedy for arrears of a rent-charge on land held by husband in right of wife, see per Holt, C. J., Billingsworth v. Spearman, 11 Mod. 169.

(*o*) Bac. Ab. Bac. and Feme, (L.); Com. Dig. Bar. and Feme, (Y.); Vin. Ab. Bar. and Feme, (X.)

(*p*) Wotton v. Hele, 2 Saund. R. 177.

(*q*) Lake v. Smith, 1 B. & P., N. R., 174. (*r*) Id.

(*s*) Bac. Ab. Bar. and Feme, (L.); Vin. Ab. Bar. and Feme, (X.), pl. 15; Mitchinson v. Hewson, 7 T. R. 348; Robinson v. Hardy, 1 Keb. 281. Marriage de facto is sufficient to

[k]Eng. Com. Law Reps. 22. [l]Id. 1. [m]Id. 39. [n]Id. 35. [o]Id. 20.

neither will a promise by, or account stated with the husband after marriage, be of itself sufficient to support an action against him as sole defendant.(*t*) But an action for use and occupation was held not to lie against the husband alone *who married during the current half year, for rent falling due at its termination, there having been no occupation by him, either in fact or in law, during the former part of such period.(*u*) Where also the cause of action accrued against the feme in autre droit, and in respect of a personal contract of the deceased, she must be sued jointly with her husband.(*x*) [*180]

226. To an action against husband and wife for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea;(*y*) and in like manner his bankruptcy and certificate constitute a valid defence.(*z*) Moreover it should be observed, that the discharge of the wife before marriage under the insolvent act is a bar to an action against husband and wife for a scheduled debt contracted previously to such discharge; and it seems that, where a discharged female insolvent acquires property and marries, whereupon such property vests in her husband, the statute affords no remedy by which it can be made available to her former creditors.(*a*) The discharge, however, of a feme covert, under the recent act 1 & 2 Vict. c. 110, s. 101, does not, by its express provision, operate to discharge her husband, from any debt mentioned in her schedule, and *such debt, so far as the same is unsatisfied, shall remain in force against the husband as fully, to all intents and purposes, as if the wife had not obtained such discharge.(*b*) [*181]

227. The contract of an infant is, by law, voidable, except it be for necessaries, in which case the infant is absolutely bound;(*c*) but infancy is no defence where the contract or promise has been ratified after arriving at full age, provided such ratification is in writing, signed by the party to be charged therewith.(*d*) And this remark applies to an account stated by an infant, which is voidable only and not absolutely void, and is therefore, like other contracts, capable of being ratified after he has attained his full age.(*e*) Where one of two joint contracting parties is an infant, he may

charge the husband for his wife's debts, incurred before coverture. Norwood v. Stevenson, Andr. 227. See the form against husband and wife on a bill of exchange accepted by the wife before marriage, Chitt. jun. Plead. 89. See ante, s. 218.

(*t*) Ante, s. 219.

(*u*) Richardson v. Hall, 1 B. & B. 50;[q] Woodfall, L. & T. 4th ed. 641.

(*x*) Mounson v. Bourn, Cro. Car. 518; Kings v. Hilton, Id. 603; Com. Dig. Administration, (D).

(*y*) Lockwood v. Salter, 5 B. & Ad. 303.[q] Quære, whether it can be replied that the wife had separate property? Id.

(*z*) Id.; Miles v. Williams, 1 P. Wms. 249; In re M'Williams. 1 Sch. & Lef. 169.

(*a*) Storr v. Lee, 9 A. & E. 868.[r]

(*b*) Stat. 7 Geo. 4, c. 57, s. 72. See the judgment in Sherrington v. Yates, 12 M. & W. 864,[♦] affirming Miles v. Williams, supra, (*z*.)

(*c*) Bac. Ad. Infancy (I. 1). See Wood v. Fenwick, 10 M. & W. 195;[♦] Macpherson on the Law of Infants, 477. 498, et seq.

(*d*) 9 Geo. 4, c. 14, s. 5. See Hartley v. Wharton, 11 A. & E. 934.[s] Liability of infant widow, see Chappel v. Cooper, 13 M. & W. 252.[♦]

(*e*) Williams v. Moor, 11 M. & W. 256,[♦] distinguishing Trueman v. Hurst, 1 T. R. 40; and Bartlett v. Emery, Id. 42, note.

[p]Eng. Com. Law Reps. 5. [q]Id. 27. [r]Id. 36. [s]Id. 39.

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nevertheless be joined as a defendant in suing on the contract, and if the infancy be pleaded, a nolle pros. may be entered as to him; if, however, the adult only be sued, and the defendant plead in abatement, the infancy may be replied.(*f*) An infant, even when sued in autre droit, can appear and [*182] defend by guardian only, and not by prochein ami or by attorney; and therefore an appearance entered for the defendant, an infant *secundum statutum*, is erroneous, and the Court will set it aside upon motion, without compelling the defendant to bring his writ of error.(*g*)

228. A person non compos mentis, like an infant, may contract for necessaries, if supplied bonâ fide.(*h*) With respect to the mode of appearing, the rule is, that an idiot defendant must appear in person, and then any one who prays to be admitted as his friend may defend for him; whereas a lunatic defends in the same manner as ordinary individuals.(*i*) It seems clear that an alien enemy, an outlaw, or an attainted felon, though unable to maintain an action in our courts, may nevertheless be sued on contracts entered into by him;(*k*) for the rule is Utlegatus respondra à touts, mais nul respondra à luy.(*l*) With respect to the *locus standi* of an outlaw in court, it seems clear that he may appear not only for the purpose of reversing his outlawry, but likewise to protect himself from irregular proceedings; he cannot, however, save as above, take any steps for his own benefit during the continuance of the outlawry.(*m*)

[*183]

CHAPTER IV.

1. BANKRUPTCY AND INSOLVENCY, ss. 229—238.
2. EXECUTORS AND ADMINISTRATORS, ss. 239—244.

1.—Bankruptcy and Insolvency.

How the Assignees of a Bankrupt should be sued, and when they are liable, ss. 229, 230. Liability of Bankrupt before and after Certificate, ss. 231—235. Insolvency, ss. 236—238.

229. The assignees of a bankrupt cannot be sued *as such* at law.(*a*) They must be personally charged on any contract entered into by them;

(*f*) Macpherson on the Law of Infants, 482—4. See Gillow v. Lillie, 1 Bing. N. C 695.[b] As to the parent's liability for the infant's debt, see Mortimore v. Wright, 6 M. & W. 482;♦ Seaborne v. Maddy, 9 C. & P. 497.[c]

(*g*) Stephens v. Lowndes, 14 L. J., N. S., C. P., 229, and authorities there cited.

(*h*) See Tarbuck v. Bisham, 2 M. & W. 2.♦

(*i*) Shelf. on Lunatics, 395, 396.

(*k*) Ramsay v. Macdonald, 1 W. Bla. 30; Banyster v. Trussel, Cro. Eliz. 516; Com. Dig. Abatement (E. 3).

(*l*) Loukes v. Holbeach, 4 Bing. 421.[d]

(*m*) Ante, s. 114. See also Davis v. Trevannion, 14 L. J., N. S., Q. B., 138.

(*a*) Ridout v. Brough, Cowp. 134, 135; Chitt. jun. Pleading, 11, n. (*f*).

[b]Eng. Com. Law Reps. 27. [c]Id. 38. [d]Id. 15.

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hence the joinder or non-joinder of assignees, as defendants, will (as in ordinary cases) be determined by considering whether the particular contract was made on behalf of all the assignees or of that one who actually entered into it.(*b*) With respect to a contract entered into by the bankrupt, it is laid down, as already stated, that the assignees have the option of adopting or rejecting such a contract, according as it is likely to be beneficial or onerous to the estate; and in the former case, the bankruptcy has no other effect on such contract than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones, nor *anticipating the period of performance on either side.(*c*) An action at suit of the messenger, for fees and necessary [*184] expenses incurred prior to the appointment of assignees, must be brought against the petitioning creditor; and for expenses incurred subsequently, against the assignees;(*d*) and a creditor entitled to a dividend must now proceed by petition to the Lord Chancellor, who may order payment thereof, with interest for the time that such dividend shall have been withheld, and costs of the application.(*e*)

230. The assignees of a bankrupt lessee may, at their election, either accept or decline the term;(*g*) and their adoption of the lease will be implied, if they intermeddle with the estate in the capacity of owners, or do any other act, as making entry on the premises, to manifest their assent to the assignment and their acceptance of the estate;(*h*) but the assignees will not render themselves liable by merely advertising leasehold premises for sale, with a view to ascertain their value, and without having, in fact, entered upon or taken possession of them.(*i*) *If the assignees adopt the [*185] lease, they are liable as ordinary assignees,(*k*) and may, like them, exonerate themselves from liability by assigning it over.(*l*) It must also be observed, that the statute applies only to cases arising between lessor and lessee and does not comprise cases between the lessee and assignee of a lease; and on the bankruptcy of the latter party, it operates only as a personal discharge of the bankrupt, and does not put an end to the lease; so that the lessee still remains liable on his personal covenants with the lessor.(*m*)

231. By stats. 6 Geo. 4, c. 16, s. 121, and 5 & 6 Vict. c. 122, s. 37, it is enacted, that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the

(*b*) Bothomley v. Usborne, Peake, Add. Cases, 99.
(*c*) See per Parke, B., Gibson v. Carruthers, 8 M. & W. 331; Twemlow v. Askey, 3 M. & W. 495; ante, ss. 117, 118.
(*d*) Burwood v. Felton, 3 B. & C. 43;[e] Billings v. Waters, 1 Stark. 363;[f] Finchett v. How, 2 Camp. 275; 6 Geo. 4, c. 16, s. 14. See Hamber v. Purser, 2 Cr. & M. 209.
(*e*) 6 Geo. 4, c. 16, s. 111. (*g*) 6 Geo. 4, c. 16, s. 75.
(*h*) Copeland v. Stephens, 1 B. & Ald. 593. 604; Hastings v. Wilson, Holt, N. P. C. 290;[g] Hanson v. Stevenson, 1 B. & Ald. 303; Ansell v. Robson, 2 Cr. & J. 610; Welsh v. Myers, 4 Camp. 368; Clarke v. Hume, 1 Ry. & Mo. 207;[i] Gibson v. Courthope, 1 D. & R. 205; Hill v. Dobie, 8 Taunt. 325.[k]
(*i*) Turner v. Richardson, 7 East, 335; Wheeler v. Bramah, 3 Camp. 340.
(*k*) Woodfall, L. & T. 4th ed. 185.
(*l*) Onslow v. Corrie, 2 Mad. 330; Taylor v. Shum, 1 B. & P. 21.
(*m*) Manning v. Flight, 3 B. & Ad. 211. 215;[l] Taylor v. Young, 3 B. & Ald. 521.[m]

[e] Eng. Com. Law Reps. 10. [f] Id. 2. [g] Id. 3. [i] Id. 21. [k] Id. 4. [l] Id. 29. [m] Id. 5.

time of issuing the fiat against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands provable under the fiat, in case he shall duly obtain a certificate of such conformity :(*n*) provided that no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with
[*186] *such bankrupt. By stat. 6 Geo. 4, c. 16, s. 127, if a certificated bankrupt or discharged insolvent shall become bankrupt, and his estate does not pay 15*s.* in the pound, the certificate under the second commission shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and other such necessaries) shall vest in the assignees under the second commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the date of issuing the commission.

232. It is not intended to enumerate the different claims and demands which have been held to be provable under the commission.(*o*) The general rule, however, is, that no claim is so provable, even though its amount can be fixed by calculation, if the intervention of a jury is necessary ;(*p*) and therefore the bankrupt continues liable on any contract of this description, entered into by him before his bankruptcy ; the creditor's inability to prove his debt and the bankrupt's continuing liability being, under the 121st section above referred to, convertible terms.(*q*) And whether the breach of contract be before(*r*) or after(*s*) the bankruptcy is not material, as regards the continuing liability of the bankrupt.

[*187] *232 *a*. By stat. 7 & 8 Vict. c. 70, s. 8, intituled "An Act for facilitating arrangements between debtors and creditors," the trustee of the estate of the petitioning debtor may sue and be sued as if he were an assignee under the statute relating to bankrupts, and all the estate of the petitioning debtor shall vest in such trustee from and after the date of the resolution and agreement of the creditors therein mentioned ; and by s. 13 the certificate shall operate as fully as a bankrupt's certificate, but shall not bar any debt excepted from the operation of the Act. We may observe also, that imprisonment by order of the court, under the statute 8 & 9 Vict. c. 127, s. 3, does not operate in anywise to extinguish the debt.

233. Formerly, a bankrupt lessee continued liable on the covenants in the lease or agreement, if his assignees declined to accept the term, although it was considered otherwise with respect to the action of debt.(*ss*) But now, it

(*n*) See stat. 5 & 6 Vict. c. 122, ss. 39. 42. Before obtaining his certificate, the bankrupt is of course liable to sued for a debt which the creditor does not elect to prove against the estate;—6 Geo. 4, c. 16, s. 59. See Augarde v. Thompson, 2 M. & W. 617.♦

(*o*) See Flather's Archb. Bankrupt Law, 4th ed. p. 100 et seq.; 1 Selw. N. P. 10th ed. 249 et seq.

(*p*) Green v. Bicknell, 8 A. & E. 701. 715,[a] and cases there cited. See Banister v. Scott, 6 T. R. 489.

(*q*) Chitt. Contr. 3rd ed. 184; 1 Selw. N. P. 10th ed. 249.

(*r*) Green v. Bicknell, 8 A. & E. 701.[a]

(*s*) Boorman v. Nash, 9 B. C. 145 [c]

(*ss*) Mills v. Auriol, 1 H. Bla. 433, affirmed in error, 4 T. R. 94; Boot v. Wilson, 8 East, 311.

[a]Eng. Com. Law Rep. 35. [c]Id. 17. ♦Reprinted by T. & J. W. J. at $2.50 per vol.

is provided by 6 Geo. 4, c. 16, s. 75, that in this case he shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any non-observance or non-performance of the conditions, covenants, or agreements therein contained; provided he deliver up such lease or agreement to the lessor, within fourteen days after notice that the assignees have declined the same; and this section has been held to apply, where the bankrupt held as yearly tenant under an unwritten contract.(*t*) When, however, *the assignees have declined to take the lease to which the bankrupt was entitled, and the bankrupt has *not* delivered up the lease to the lessor, the property in the demised premises in the meantime continues vested in the bankrupt, and the lessor retains until such delivery up to him his right of distress for the rent.(*u*) Moreover, if the assignees do not elect to take the lease, and the bankrupt omit to deliver up the same, it seems that he would be liable for breaches of covenant occurring subsequently to the bankruptcy;(*x*) but if the assignees accept the lease, the bankrupt's discharge is so complete, that should he afterwards come in as assignee of his own assignees, he will be liable simply as such.(*y*) [*188]

234. It is clear that an action lies against an uncertificated bankrupt on any contract entered into by him since the fiat issued; and he may renew his liability in respect of any claim provable under the commission, and which consequently would be barred by the certificate, if he agree so to do in writing, signed by himself, or by some person thereto lawfully authorized in writing by him;(*z*) and as to this renewal of liability there is no distinction between the case of a promise *made before the certificate and one made after it. Either will be binding, though the only consideration be the old debt, provided the promise be one which binds the bankrupt *personally* to pay, notwithstanding his certificate.(*a*) The agreement to pay will clearly be void if executory, and made with the creditor in consideration of his signing the certificate, or of his forbearing to oppose the same (*b*); or be in other respects fraudulent and contrary to the policy of the bankrupt act.(*c*) [*189]

235. A foreign certificate, which operates as a discharge of a debt in the country where it was contracted, is a discharge of it everywhere;(*d*) but a certificate obtained abroad is no bar to an action for a debt contracted here

(*t*) Slack v. Sharpe, 8 A. & E. 366;[p] but see the remarks on this case, Briggs v. Sowry, 8 M. & W. 739.[♦]

(*u*) Briggs v. Sowry, 8 M. & W. 729.[♦] Newton v. Scott, 9 M. & W. 434;[♦] S. C. affirmed in error, 10 Id., 471, which cases are recognised in Philips v. Shervill, 14 L. J. N. S. Q. B. 144.

(*x*) Copeland v. Stephens, 1 B. & Ald. 593, which was decided under the stat. 49 Geo. 3, c. 121, s. 19. See Tuck v. Fyson, 6 Bing. 331;[q] Inglis v. M'Dougal, 1 Moore, 196.

(*y*) Doe d. Cheere v. Smith 5 Taunt. 800.[r]

(*z*) 6 Geo. 4, c. 16, s. 131, 5 & 6 Vict. c. 122, s. 43, Lobb v. Stanley, 5 Q. B. 574.[s]

(*a*) Kirkpatrick v. Tattersall, 13 M. & W. 766.[♦]

(*b*) 6 Geo. 4, c. 16, s. 125, 5 & 6 Vict. 122, s. 40; Haywood v. Chambers, 5 B. & Ald. 753;[t] Kirpatrick v. Tattersall, supra.

(*c*) Davis v. Holding, 1 M. & W. 159,[♦] recognized Belcher v. Sambourne, 6 Q. B. 414. 422. See Seivers v. Boswell, 4 Scott, N. R. 165; Staines v. Wainwright, 6 Bing. N. C. 174;[u] Rose v. Main, 1 Bing. N. C. 357.

(*d*) Per Lord Mansfield, C. J., Ballantine v. Golding, Co. B. L. 5th ed. 499, recognised by Lord Ellenborough, C. J., Potter v. Brown, 5 East, 130; Hunter v. Potts, 4 T. R. 182.

[p] Eng. Com. Law Reps. 35. [q] Id. 19. [r] Id. 1. [s] Id. 48. [t] Id. 7. [u] Id. 37

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with a subject of this country, for a contract made in one country cannot be governed by the laws of another.(e) However, a certificate under an Irish commission of bankrupt, pursuant to stat. 6 & 7 Will. 4, c. 14, is a bar, as well of debts due from the bankrupt in England or Scotland, as of those [*190] incurred by him in *Ireland;(f) and it seems that an English certificate is an answer to every contract by the bankrupt made in any part of the world.(g) (As to a discharge under a Scotch sequestration, see Sidaway v. Hay, 3 B. & C. 12; under a *cessio bonorum*, see Phillips v. Allan, 8 B. & C. 477.)

236. By the statute 1 & 2 Vict. c. 110, s. 91, an insolvent who has become entitled to the benefit of the act by the adjudication of the court for the relief of insolvent debtors may, if sued in respect of any debt mentioned in his schedule, or in respect of any new contract or security for the payment thereof,(k) plead generally, in answer to such action, his discharge according to the act; and by the subsequent act, 5 & 6 Vict. c. 116, ss. 7, 10, amended by 7 & 8 Vict. c. 96, it is enacted, that, on the passing of the final order, the estate of the petitioner shall become absolutely vested in the official assignee, and assignee chosen by the creditors,(l) without any deed or conveyance, who shall sue and be sued like the assignees under a fiat in bankruptcy;(m) and that the presentation of the *petition, and final [*190 a] order of the commissioner, shall be a sufficient plea in bar of any action for or in respect of a debt contracted before the date of filing the petition.(n) A discharged insolvent, however, like a certificated bankrupt, remains liable for damages unascertainable at the time of his discharge, and therefore unextinguished by it;(o) and under the recent statute 7 & 8 Vict. c. 96, the final order only protects the person of the insolvent from process, and consequently such final order is no bar to an action brought against the insolvent.(p)

237. Where the assignee of an insolvent lessee accepts the lease, it is enacted, that the insolvent shall not be liable to pay any subsequent rent to which his discharge would not apply, nor be liable for non-performance of the covenants in the lease. If, in such a case, the assignee decline to determine whether or not he will accept such lease, the lessor may thereupon apply to the court to order that the assignee shall either accept the lease, or deliver up the same, together with possession of the demised premises, to the lessor.(q) In like manner the recent stat. 7 & 8 Vict. c. 96, s. 12, enacts, that where any petitioner under that act shall be entitled to any

(e) Smith v. Buchanan, 1 East, 6; Per Kenyon, C. J., Id. 10; Phillips v. Allan, 8 B. & C. 477.[x]

(f) Fergusson v. Spencer, 2 Scott, N. R. 229. See Lewis v. Owen, 4 B. & Ald. 654.[y]

(g) Per Pollock, C. B., Armani v. Castrique, 14 L. J., N. S., Ex. 38.

(k) See 7 Geo. 4, c. 57, s. 61; Collins v. Benton, 3 Scott, N. R. 183; Sheerman v. Thompson, 11 A. & E. 1027;[z] Denne v. Knott, 7 M. & W. 143;[a] Evans v. Williams, 1 Cr. & M. 30; Ashley v. Killick, 5 M. & W. 509;[a] Rogers v. Kingston, 2 Bing. 441.[b]

(l) See Nicholls v. Payne, 15 L. J., N. S., C. P. 23; Gillon v. Deare, Id. 25; Tyler v. Shinton, Id. Q. B. 204.

(m) See also 7 & 8 Vict. c. 96, s. 13. (n) Ante, s. 126.

(o) See per Tindal, C. J., Wilmer v. White, 6 Bing. 293.[c]

(p) Toomer v. Gingell, Q. B., Trin. T., June 9, 1846, citing Nicholls v. Payne, 2 Dowl. & L. 629. (q) 1 & 2 Vict. c. 110, s. 50.

[x]Eng. Com. Law Reps. 15. [y]Id. 6. [z]Id. 39. [b]Id. 9. [c]Id. 19.
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lease or agreement for a lease, and his assignee shall accept the same, the said petitioner shall not be liable to pay any rent accruing after the filing of *his petition, nor be in any manner sued after such acceptance, in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; provided that, if the assignee shall decline upon his being required so to do, to determine whether he will or will not accept such lease or agreement for a lease, the lessor or person agreeing to make such lease may apply to the commissioner, praying that he may either so accept the same, or deliver it up, together with possession of the premises, and the commissioner shall thereupon make such order as shall seem meet and just, and the same shall be binding upon all parties. It has been held(r) that the landlord's remedy by distress for rent due before the commencement of a tenant's imprisonment is not extinguished by the tenant's petition and discharge under the stat. 1 & 2 Vict. c. 110, although the amount of rent was inserted in his schedule as a debt due to the landlord, and the distress was not made until after the discharge. "The judgment confessed to the provisional assignee," it was observed by Lord Denman, C. J., "may have the effect of an additional and a collateral security, but neither merges nor extinguishes the peculiar remedy by distress, which is incidental to rent service, and is quite independent of other remedies, and therefore remains, notwithstanding the discharge of the tenant, under the Insolvent Act, except so far as that act has expressly restrained it." *[190 b]

237 *a*. Under the stat. 1 Geo. 4, c. 119, the interest *of the insolvent in the term has been held to pass absolutely by the assignment to the provisional assignee, even without any express act of acceptance on his part;(rr) though it has likewise been held, that he is entitled to an option, whether he will accept or decline the lease, and a reasonable time to decide.(s) Where the provisional assignee of an insolvent lessee had assigned over the insolvent's estate to the assignee appointed by the insolvent court, under the stat. 1 Geo. 4, c. 119, s. 7, who acted as tenant of the demised premises, as well as assented to the assignment, it was held, that an action of covenant lay against the executor of such assignee for rent accrued due, and breaches of covenant committed, since the testator's death, no fresh assignee having been appointed by the court under the 14th section of the statute.(t) [*191]

238. With respect to the future property of the insolvent, the abovementioned act, 1 & 2 Vict. c, 110, directs,(u) that a judgment shall be entered up in one of the courts at Westminster against the prisoner, for the amount of the debts stated in the schedule, or so much thereof as shall be left unpaid, and in respect of which he shall have been discharged; and upon such judgment, the future property of the insolvent may by *order of the court, and subject to its discretion and superintendence, be taken in execution and rateably divided among the creditors. [*192]

(r) Phillips v. Shervill, 14 L. J., N. S., Q. B. 144.
(rr) Doe d. Palmer v. Andrews, 4 Bing. 348. 351;[d] Crofts v. Pick, 1 Bing. 354.
(s) See Woodfall, L. & T. 4th ed. 188, n. (u), and cases cited, Id.; supra, n. (rr).
(t) Abercrombie v. Hickman, 8 A. & E. 683.[f]
(u) Sect. 87; see the corresponding section in the Lords' Act, 32 Geo. 2, c. 28, s. 20.

[d]Eng. Com. Law Reps. 13. [e]Id. 8. [f]Id. 35. [f]Id. 35.

2.—Executors and Administrators.

Liability of Personal Representatives, ss. 239—242. What Causes of Action may be joined in suing Personal Representatives, s. 243. Rule as to the Joinder of Personal Representatives, and in Case of Survivorship, &c., s. 244.

239. When the relation of landlord and tenant subsists, we have already(x) stated under what circumstances the personal representatives of either may be sued; in other cases, the rule is, that the personal representatives, though not expressly named, are liable, as far as they have assets, on all the covenants and contracts of the deceased broken in his lifetime, and contracts of the deceased broken after his death, for the due performance of which his skill or taste was not required,(y) and which were not to be performed by the deceased in person.(z)

[*193] *240. The personal representatives are also liable in that character, on a covenant by deceased, for their performance of a particular act,(a)—as payment of a sum of money; and it has been held, that an action lies against executors on an obligation or covenant by the testator to instruct an apprentice in his trade, though it sounds as a personal act; the reason assigned being, that they ought to see the apprentice taught his trade, and if not of the same trade, they ought to assign him to another, who is of the same trade, so that he may be taught according to the covenant.(b) So, executors have been held liable on a covenant to build a house, which was commenced but left unfinished by the testator,(c) and on the deceased's contract for the performance of work by another party, before the completion of which he died, but which was subsequently completed;(d) and the same principle was held to apply, where an intestate had entered into an agreement to receive from plaintiffs a certain quantity of slate monthly, for a certain period, a portion of which, when tendered after his death, but before the expiration of the stipulated period, his administrator refused to accept.(e)

[*194] *241. Where several persons jointly contract for a chattel to be made or procured for the common benefit of all,—the building of a

(x) Ante, ss. 166. 176—180; Fox v. Waters, 4 P. & D. 1. As to suing personal representatives for a legacy or for a distributive share of the personal estate, ante, s. 152.

(y) Per Parke, B., Siboni v. Kirkman, 1 M. & W. 423;♦ Per Patterson, J., Wentworth v. Cock, 10 A. & E. 445, 446;[s] Bac. Ab. Executors and Administrators, (P. 1); Com. Dig. Administration, (B. 14).

(z) Hyde v. The Dean and Canons of Windsor, Cro. Eliz. 552, 553; Per Cur., Marshall v. Broadhurst, 1 Cr. & J. 406; ante, s. 152.

(a) Ex parte Tindal, 8 Bing. 404, 405,[h] and cases there cited; Powell v. Graham, 7 Taunt. 580.[i]

(b) Walker v. Hull, 1 Lev. 177, cited arg., 10 A. & E. 43,[k] but denied Baxter v. Burfield, 2 Stra. 1266; Rex v. Peck, 1 Salk. 66; ante, 129.

(c) Quick v. Ludborrow, 3 Bulstr. 30, recognized 1 M. & W. 423.♦ See per Lord Abinger, C. B., 3 M. & W. 353, 354;♦ Per Cur., Marshall v. Broadhurst, 1 Cr. & J. 405, 406.

(d) Corner v. Shew, 3 M. & W. 350. 352.♦ Semble, the declaration in this case should be special stating the facts. Id.

(e) Wentworth v. Cock, 10 A. & E. 42.[k]

[s]Eng. Com. Law Reps. 37. [h]Id. 21. [i]Id. 2. [k]Id. 37.
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of a ship, for instance, or the furnishing of a house; and as to which the executors of any party dying before the work is completed are, by agreement, to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor, that his executors should pay their proportion of the price of the article to be furnished.(*g*)

242. The action of debt on simple contract, except for rent,(*h*) did not formerly lie against a personal representative for a debt contracted by the deceased,(*i*) unless the undertaking to pay originated with the representative;(*k*) and the reason of this was, that personal representatives, when charged for the debt of the deceased, were not admitted to wage their law, and consequently were deprived of a legal defence, which the deceased himself might have made use of.(*l*) But this reason did not apply to the action of assumpsit, which, therefore, might always have been brought;(*m*) and the executors of a sheriff, who had levied under a fi. fa., and died *without paying over the money, but after it had been received, were held liable in the action of debt.(*n*) And now, by stat. 3 & 4 [*195] Will. 4, c. 42, s. 13, wager of law is abolished, and by s. 14 it is enacted, that an action of debt on simple contract shall be maintainable in any court, of common law against an executor or administrator.

243. In suing an executor or administrator *as such*,(*o*) causes of action on which he would be liable personally, cannot be joined with others on which liability is incurred by him in his representative capacity alone. In the former class are comprised, a bill of exchange indorsed by him,(*p*) or a promissory note in which he promises, in his representative character, to pay "with interest on demand,"(*q*) or a submission to arbitration, whereby he admits assets;(*r*) so, a count for money lent to, or had and received by him as executor or administrator,(*s*) or for work and labour performed, and materials supplied, for the funeral of the deceased,(*t*) would *entail a personal liability: and in all these instances, the judgment would [*196]

(*g*) Per Alderson, B., delivering the judgment of the Court, Prior v. Hembrow, 8 M. & W. 889, 890.♦

(*h*) Norwood v. Read, Plowd. 180. See 1 Selw. N. P. 10th ed. 600; Williams's Executors, 3rd ed. 1513. 1351.

(*i*) Barry v. Robinson, 1 Bos. & Pul. N. R. 293. Except in the Exchequer, where wager of law was not allowed. 1 Chitt. & Hulme, Statutes, 24 n. (*l*).

(*k*) Riddell v. Sutton, 5 Bing. 206.[l]

(*l*) 3 Bl. Com. 16th ed. 347, and n. (12); 2 Selw. N. P. 10th ed. 796.

(*m*) 2 Selw. N. P. 10th ed. 797. (*n*) Perkinson v. Gilford, Cro. Car. 539.

(*o*) In an action against A. and B. as executors, A. cannot plead that B. is not an executor. Atkins v. Humphrey, 15 L. J., N. S., C. P. 120. Plea of Ne unques executor, Wood v. Kerry, Id. 122; Scott v. Wedlake, 14 L. J., N. S., Q. B. 359. As to legacies under £20, see also 9 & 10 Vict. c. 95, s. 65.

(*p*) King v. Thom, 1 T. R. 489. (*q*) Childs v. Monins, 2 B. & B. 460.[m]

(*r*) Riddell v. Sutton, 5 Bing. 200,[n] and cases there cited. See Dowse v. Coxe, 3 Bing. 20;[o] S. C., but not S. P., 6 B. & C. 255.[p]

(*s*) Ashby v. Ashby, 7 B. & C. 444;[q] Waite v. Gale, 14 L. J., N. S., Q. B., 212; Blakesley v. Smallwood, 15 Id., Q. B., 185; Churchill v. Bertrand, 3 Q. B. 568;[r] Jennings v. Newman, 4 T. R. 347; Rose v. Bowler, 1 H. Bla. 108; Brigden v. Parkes, 2 B. & P. 424; Per Alderson, B., Corner v. Shew, 3 M. & W. 351.♦

(*t*) Corner v. Shew, 3 M. & W. 350. 356.

[l]Eng. Com. Law Reps. 15. [m]Id. 6. [n]Id. 15. [o]Id. 11. [p]Id. 13. [q]Id. 14. [r]Id. 43.
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be de bonis propriis; whereas, if the personal representative be liable *as such*, the judgment must de bonis testatoris.(*u*) But an executor may, it seems, be sued in that character, for money paid for his use;(*x*) and in an action against an administrator on promises of the intestate, the declaration may include an account stated with the administrator as such, of money due from the intestate, for, on this, a personal liability would not attach.(*y*) The Statute of Frauds enacts, that, in order to charge an executor or administrator upon any special promise to answer damages out of his own estate, the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged, or some other person thereunto by him lawfully authorized; and it is further necessary, that there be some new and sufficient consideration for such such promise.(*z*)

244. Although, in general, all the executors must be sued jointly, since they have a joint and entire interest in, and authority over, the goods of the testator,(*a*) yet it is unnecessary to join as defendants such as have not administered to the will; and in pleading the non-joinder of a co-ex- [*197] ecutor as defendant, an averment must be made, that he has taken upon himself administration.(*b*) It may be added, that, although a party declared against as executor may plead that he is not such, yet, as the form of declaring against an executor de son tort is the same as that of declaring against a rightful executor, this plea will not succeed if the defendant has in any way intermeddled with the estate of the deceased.(*c*) But an executor de son tort need not be joined as a co-defendant with the rightful executor, and cannot be so joined with a lawful administrator.(*d*) If one of several executors, sued jointly, be an infant, he must defend by guardian.(*e*) Where there are several administrators to the intestate's estate, they must, like executors, be sued jointly;(*g*) and in case of the death of a co-executor or co-administrator, the survivors are the parties against whom the action must be brought, for the interest is joint and entire.(*h*) On the death of the surviving executor, if testate, the action must be brought against his executor; if intestate, the administrator de bonis non of the original testator is the proper party to be sued, as also on the death of the administrator of the orignal intestate.(*i*)

(*u*) 2 Wms. Saund. 117 d, and cases, supra.
(*x*) Ashby v. Ashby, 7 B. & C. 444;[s] Per Lord Abinger, C. B., 3 M. & W. 353.
(*y*) Secar v. Atkinson, 1 H. Bla. 102; Corner v. Shew, 3 M. & W. 350; Ashby v. Ashby, 7 B. & C. 444.[s]
(*z*) 29 Car. 2, c. 3, s. 4; 1 Wms. Saund. 211, n. (2.)
(*a*) Com. Dig. Administration, (B. 12), Pleader, (2 D. 6); judgment, Nation v. Tozer, 1 Cr. M. & R. 174; and see Gleadow v. Atkin, 2 Cr. & J. 548; Douglas v. Forrest, 4 Bing. 704.[t]
(*b*) Swallow v. Emberson, 1 Lev. 161; Per Grose, J., Rawlinson v. Shaw, 3 T. R. 560. See the form, Chitt. jun. Pleading, 200.
(*c*) 1 Wms. Saund. 265, n. (2); 2 Bla. Com. 507; Chitt. jun. Pleading, 295, n. (*l.*)
(*d*) Com. Dig. Administrator, (C. 3), Abatement, (F. 10.)
(*e*) Frescobaldi v. Kinaston, Stra. 783.
(*g*) Com. Dig. Administration, (B. 12), Abatement, (F. 10.)
(*h*) Id. (*i*) See ante, s. 135.

[s] Eng. Com. Law Reps. 14. [t] Id. 15.

*PART III. [*198]

PLAINTIFFS IN ACTIONS EX DELICTO.

CHAPTER I.

GENERAL RULES.

General rule, how applicable in the different Forms of Actions ex Delicto, ss. 245—255. Rules as to the Joinder or severance of Plaintiffs, ss. 256—259. Assignment of Remedy for a Tort, s. 260.

245. THE rule of most general application being, that, in actions ex delicto, he in whom the legal right or property was vested, and who has consequently sustained the injury, is the proper party to call for compensation from the wrong-doer,(a) it seems desirable to consider how this rule applies in different forms of action ex delicto. In the action of ejectment, which is for trying the right to property, the demise must be laid in the name of the party legally entitled; a mere equitable title or beneficial interest, is not sufficient to support it.(b) Ejectment, therefore, lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest, *but not before, for by such assent the property vested in the legatee.(c) So, this action may be maintained by a devisee,(d) [*199] mortgagee,(e) or grantee of a rent-charge who enters and holds rents in satisfaction under a proviso in the grant,(g) and by a personal representative,(h) or a provisional assignee;(i) for in all these parties the legal estate is vested.(k) There are also cases in which an ejectment may be maintained on a title, which, though bad as against one particular individual, is valid as against all others; as, if a copyholder leases for years, without license of the lord or custom authorizing such lease, the lessee has nevertheless a title against every one but the lord, and may bring ejectment.(l) The action for mesne profits may be brought either in the name of the nominal or real plaintiff in ejectment; and so may an action for an escape, the defendant having been in execution for the mesne profits so recovered.(m)

(a) See per Lord Kenyon, C. J., Dawes v. Peck, 8 T. R. 332.

(b) Goodtitle v. Jones, 7 T. R. 50; Doe d. Hodsden v. Staple, 2 T. R. 684. 696; Per Lord Kenyon, C. J., Doe d. Reade v. Reade, 8 T. R. 122; ante, s. 2. As to ejectment by joint tenants, &c., ante, ss. 30—34; by mortgagor and mortgagee, ss. 41—45.

(c) Doe v. Guy, 3 East, 120. (d) Co. Litt. 240, b.

(e) See 2 Bla. Com. 158; Smartle v. Williams, 1 Salk. 245.

(g) Jemott v. Cowley, 1 Saund. R. 112. (h) Com. Dig. Administration, (B. 13.)

(i) Doe d. Clark v. Spencer, 3 Bing. 203; Doe d. Spencer v. Clark, 3 Bing. 370.[a] See Doe v. Andrews, 4 Bing. 348;[x] 1 & 2 Vict. c. 110, s. 37.

(k) See other instances, 2 Selw. N. P. 10th ed. 689.

(l) Doe d. Tresidder v. Tresidder, 1 A. & E., N. S. 416.[y] But the assignee of a lease, rendered void by the death of tenant in tail, cannot maintain covenant against the representatives of the latter, Andrew v. Pearce, 1 B. & P., N. R. 158.

(m) Doe v. Jones, 2 M. & S. 473; Aslin v. Parkin, 2 Burr. 665.

[a]Eng. Com. Law Reps. 11. [x]Id. 13. [y]Id. 41.

[*200] *246. To sustain trespass quare clausum fregit, mere possession, without allegation of title, is sufficient, as against persons who have no title at all, and who are mere wrong-doers.(n) Hence, one in possession under a void lease may bring trespass, even though on such a demise, an ejectment could not have been maintained, for the latter remedy is founded on title.(o) But possession is essential; and therefore the party having the right of entry on land must acquire lawful possession by entry in order to maintain trespass against a wrongful occupant who continues upon the land;(p) as, in the case of a disseisee, who, although he may sue the disseisor for the original tort, cannot maintain trespass against him for the wrongful continuance in possession (unless his estate be determined so that he cannot re-enter,) or against a stranger in respect of a trespass after the disseisin, without re-entry on the land.(q) So, a lessor being out [*201] of possession, or a lessee before entry, cannot *maintain trespass; nor can a mortgagee who had not entered, his right so to do not having accrued.(r)

247. Where the possession is for a limited period, and for a special purpose, trespass will lie; as, at suit of the contractors for making a canal, who were in possession for that purpose, and had erected a dam upon the locus in quo with their own materials, and with the consent of the owner of the soil.(s) And as against a wrongdoer, a wrongful possession will support trespass;(t) though a party wrongfully holding possession of land cannot treat the rightful owner, who enters on the land, as a trespasser.(u)

248. But the possession must be exclusive,(x)—and therefore case, and not trespass, is the proper remedy for disturbing the plaintiff in the enjoyment of a pew annexed to his house;(y) though, if the pew itself which the party had put up be broken, trespass would lie;(z) so, case is the proper form of action for disturbing plaintiff's right of common,(a) or common [*202] of estovers,(b) *fishery, or turbary,(c) or his interest in a market, watercourse, way, or other easement.(d) But trespass will lie at

(n) Harper v. Charlesworth, 4 B. & C. 591;[a] Dent v. Oliver, Cro. Jac. 122; Holmes v. Newlands, 11 A. & E. 44;[b] Cary v. Holt, 11 East, 70, n. (a); Chambers v. Donaldson, 11 East, 65; Harker v. Birkbeck, 3 Burr. 1563; Heath v. Milward, 2 Bing. N. C. 98;[c] Carnaby v. Welby, 8 A. & E. 872;[d] Matson v. Cook, 4 Bing. N. C. 392;[e] see Wild v. Holt, 9 M. & W. 672. (o) Graham v. Peat, 1 East, 244. 246.

(p) Com. Dig. Trespass, (B. 3); Butcher v. Butcher, 7 B. & C. 399;[f] Hey v. Moorhouse, 6 Bing. N. C. 57;[g] Duke of Newcastle v. Clark, 2 B. Moore, 666; Lutwich v. Mitton, Cro. Jac. 604. By induction the parson is put in possession of the glebe land without having taken actual possession, Bulwer v. Bulwer, 2 B. & Ald. 470.

(q) Com. Dig. Trespass, (B. 2, 3); Holcomb v. Rawlyns, Cro. Eliz. 540; Liford's case, 11 Rep. 51 a, cited 6 Bing. N. C. 57.[g]

(r) Wheeler v. Mountefiore, 11 Law Journ., N. S., Q. B. 34.

(s) Dyson v. Collick, 5 B. & Ald. 600.[h] See Welden v. Bridgewater, Cro. Eliz. 421.

(t) Per Curiam, Dyson v. Collick, 5 B. & Ald. 603.[h]

(u) Taunton v. Costar, 7 T. R. 431; Butcher v. Butcher, 7 B. & C. 402.[i]

(x) Revett v. Brown, 5 Bing. 7;[k] Greathead v. Morley, 3 Scott, N. R. 538.

(y) Stocks v. Booth, 1 T. R. 428. 430; Mainwaring v. Giles, 5 B. & Ald. 356.[h]

(z) Per Best, C. J., 3 Bing. 138,[l] citing Dawtrie v. Dee, Palm. 46.

(a) 1 Selw. N. P. 10th ed. 422. (b) Ashmead v. Ranger, 12 Mod. 380.

(c) Smith v. Kemp, 2 Salk. 637; Per Wilmot, J., Wilson v. Mackreth, 3 Burr. 1826.

(d) Chitt. jun. Pl. 497, n. (a), and the forms, Id. 610, et seq. See Smith v. Kemp, 2 Salk. 637; Mason v. Hill, 3 B. & Ad. 304;[m] S. C. 5 B. & Ad. 1.[n]

[a] Eng. Com. Law Reps. 10. [b] Id. 39. [c] Id. 29. [d] Id. 35. [e] Id. 33. [f] Id. 14. [g] Id. 37. [h] Id. 7. [i] Id. 14. [k] Id. 15. [l] Id. 11. [m] Id. 23. [n] Id. 27.

suit of a party who has an exclusive right or interest in land, the soil of which belongs to another; as the exclusive right to cut turf in a waste belonging to the lord of the manor.(*e*) So, it was held, that a person entitled to the exclusive enjoyment of a growing crop, during the proper period of its growth, and until it was cut and carried away, might maintain trespass in respect of such exclusive right;(*g*) and one entitled exclusively to the vesture of land, that is, to the corn, grass, underwood, and the like, may have an action of trespass qu. cl. fr.(*h*) It must be observed, also, that where the party in occupation is not the owner of the soil, although he is the proper plaintiff in an action of trespass, or on the case for the injury to the possession; yet there is also a remedy in case by the reversioner, for the consequential damage, if any, to his reversionary interest;(*i*) and recovery of damages for the erection of a nuisance, whether by the party in possession,(*k*) or by *the reversioner,(*l*) will be no bar to another action for continuing the same nuisance. Lastly we may observe, [*203] that as mere possession is sufficient to maintain trespass qu. cl. fr. against any one who cannot shew a better title, if issue be joined on a plea denying plaintiff's property in the close, his case will be established by proof of possession, and the defendant cannot under the above plea offer evidence of title in himself.(*m*)

249. To entitle a man to bring trespass for an injury to personal property, he must, at the time when the act was done which constitutes the trespass, either have the actual possession in him of the thing which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him;(*n*) therefore the lord should sue in trespass for an estray or wreck taken by a stranger before seizure by the lord, for the right is in the latter, and a constructive possession, in respect of the thing being in the manor of which he is lord.(*o*) So, an executor has the right immediately on the death of the testator; and the right draws after it a constructive possession.(*p*)

250. Where chattels are let under a lease or agreement, the possession is in the lessee, and he should sue in trespass for their seizure.(*q*) So, where chattels *are mortgaged, but by the terms of the mortgage deed the mortgagee is precluded from taking possession before a certain day, [*204] the mortgagor, prior to such day, will be the proper party to sue for a trespass to the chattels which have been mortgaged. Accordingly, where F. demised a messuage to W. for a term of years by way of mortgage, and by

(*r*) Per Curiam, Wilson v. Mackreth, 3 Burr. 1824; Weldon v. Bridgewater, Cro. Eliz. 421.

(*g*) Crosby v. Wadsworth, 6 East, 602; Co. Litt. 4, b. See Welsh v. Hall, cited, 2 Selw. N. P. 10th ed. 1313.

(*h*) Id. (*i*) Post, s. 261.

(*k*) Holmes v. Wilson, 10 A. & E. 503,° and cases there cited.

(*l*) Shadwell v. Hutchinson, 2 B. & Ad. 97.ᵖ See Fay v. Prentice, 1 C. B. 828.

(*m*) Whittington v. Boxall, 5 Q. B. 139.ᵍ

(*n*) Per Ashhurst, J., Smith v. Milles, 1 T. R. 480; Young v. Hickens, 6 Q. B. 606; Hurrell v. Ellis, 15 L. J., N. S., C. P. 18.

(*o*) 1 T. R. 480. (*p*) Id.

(*q*) Ward v. Macauley, 4 T. R. 489, recognised Gordon v. Harper, 8 T. R. 11.

°Eng. Com. Law Reps. 37. ᵖId. 22. ᵍId. 48.

the same indenture assigned to him certain chattels by way of security, but by the terms of the mortgage deed the mortgagee was only to enter upon the demised premises if default of payment of the mortgage money should be made on a certain day: it was held, that the mortgagee could not, prior to that day, maintain trespass against the sheriff for entering upon the demised premises, and levying upon the said chattels under a fi. fa.(*r*) The true ground of this decision being, that a lessee for years before entry cannot maintain trespass qu. cl. fr., and as to the goods, that trespass to chattels cannot be maintained by one who has neither possession nor the right of possession at the time of the alleged trespass.(*s*) A mere gratuitous permission, however, to a third person to use a chattel, does not, in contemplation of law, take it out of the possession of the owner; and he may maintain trespass for any injury done to it while it is so used,(*t*) or the gratuitous bailee may sue.(*u*) Where, however, there is an *injury to the reversion, as in the case of a horse let on hire, and killed by defendant's violent driving, although trespass lies at suit of the party in possession, the owner may have an action on the case for such injury to his reversion.(*x*) In trespass for taking away the materials of a bridge erected and dedicated by plaintiff to the public use, it was held, that the property in such materials, on ceasing to form a part of the bridge, reverted to the plaintiff as original owner.(*y*)

[*205]

251. In trover, that party must sue who has the property(*z*) in the goods, either absolute or special, coupled with the right of possession, the distinction between the actions of trespass and trover being, that the former is founded on possession, the latter on property.(*a*) Since, therefore, the owner of a chattel retains his right of property in the goods, even while they are in the custody of the law, he may, when they are out of such custody, maintain trover for them, and it will be no defence for the party in possession to show that the goods have been at a prior time in the custody of the law.(*b*)

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251 *a*. With respect to the action of detinue, which, however, should

(*r*) Wheeler v. Montefiore, 2 Q. B. 133.[r]

(*s*) Judgment, Doe d. Parsley v. Day, 2 Q. B. 155.[r] In trespass de bonis asportatis a plea denying that the goods are the plaintiff's, puts in issue the *property* as well as the *possession*, Harrison v. Dixon, 12 M. & W. 142.[♦] See Griffiths v. Puleston, 13 M. & W. 358.[♦]

(*t*) Lotan v. Cross, 2 Camp. 464.

(*u*) Rooth v. Wilson, 1 B. & Ald. 59.

(*x*) Hall v. Pickard, 3 Camp. 187; Ferguson v. Cristall, 5 Bing. 305.[s]

(*y*) Harrison v. Parker, 6 East, 154; Lade v. Shepherd, 2 Stra. 1004.

(*z*) When property passes under contract or sale, see Laidler v. Burlinson, 2 M. & W. 602,[♦] and cases there cited; Scott v. England, 14 L. J., N. S., Q. B., 43; property does not pass by a verbal gift unaccompanied by delivery, Irons v. Smallpiece, 2 B. & Ald. 551; see Lunn v. Thornton, 1 C. B. 379; followed in Gale v. Burnett, 14 L. J., N. S., Q. B., 340; Reeves v. Capper, 5 Bing. N. C. 136. 139.[t]

(*a*) Per Ashhurst and Grose, JJ., Gordon v. Harper, 7 T. R. 490; Per Lord Kenyon, C. J., Ward v. Macauley, 4 T. R. 490; Bloxam v. Sanders, 4 B. & C. 941;[u] Benjamin v. Bank of England, 3 Camp. 417; Brockbank v. Anderson, 7 Scott, N. R. 813; Rackham v. Jesup, 3 Wils. 332; Flewellin v. Rave, 1 Bulstr. 68; Fraser v. The Swansea Canal Company, 1 A. & E. 354.[x] See particularly, Wilbraham v. Snow, 2 Wms. Saund. 47 *a*, n. (1), and the cases there cited. Per Maule, J., Leake v. Loveday, Scott, N. R., 926.

(*b*) Turner v. Fore, 15 L. J., N. S., Ex. 215.

[r]Eng. Com. Law Reps. 42. [s]Id. 15. [t]Id. 35. [u]Id. 10. [x]Id. 28.
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more properly be classed with actions in form ex contractu,(c) it will be convenient here to observe that this action, the gist of which is for the wrongful detainer,(d) may, like trover, be sustained by the party having the general or special property in specific goods and the right to the immediate possession against another, who is in actual possession thereof, either by delivery or finding, and who refuses to re-deliver them;(e) as, if A. deliver goods to B. to deliver to C., C. may have detinue, for the property is vested in him by the delivery to his use.(f)

252. Absolute property is where one having the possession of chattels has also the exclusive right to enjoy them, and which can only be defeated by some act of his own.—Special property is where he who has the possession holds them subject to the claims of other persons,(g)—*as in the case of a sheriff, who has seized goods under a fi. fa.;(h) [*206 a] and is acquired as against a wrong-doer by mere possession(i) (in the absence of other proof,(k)) or by bailment,(l) though gratuitous;(m) in which latter case, either the bailor or the bailee may sue, and whichever first obtains damages, such recovery operates as a complete satisfaction.(n)

252 *a*. In the case of a pledge of goods, the pawnor retains his property in the chattel pawned, subject only to the rights of the pawnee; he may, therefore, transfer to another the qualified property which he himself possesses, and the purchaser may maintain trover against the pawnee for a wrongful conversion of the chattel.(o) So, if several chattels are pawned for one entire sum, and subsequently sold by the pawnor to several purchasers, trover will lie for a conversion at suit of each *purchaser against the pawnee, though the latter will not be bound to part [*206 b] with any of the chattels until the whole debt be paid. Again, "suppose the chattel is injured by default of the pawnee while in his custody, who is to sue the pawnee—the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff if the action be for a breach of contract, express or implied, unless a new one be made with the purchaser. The owner for the time being is the proper plaintiff if the injury be by the

(c) Per Tindall, C. J., Walker v. Needham, 4 Scott, N. R. 226.
(d) See Gledstane v. Hewitt, 1 Cr. & J. 565; Walker v. Jones, 2 Cr. & M. 672; Whitehead v. Harrison, 6 Q. B. 423. 431.
(e) Philips v. Robinson, 4 Bing. 106. 111;[a] Co. Litt. 286, b.; Kettle v. Bromsall, Willes, 118. See Bateman v. Elman, Cro. Eliz. 866; Per Grose, J., 7 T. R. 12.
(f) 1 Roll. Ab. 606 (C.); pl. 1; cited per Coleridge, J., Whitehead v. Harrison, 6 Q. B. 428; Flewellin v. Rave, 1 Bulstr. 68.
(g) Per Lawrence, J., Webb v. Fox, 7 T. R. 398; 2 Wms. Saund. 47 d.; infra, n. (m).
(h) Wilbraham v. Snow, 1 Saund. R. 47.
(i) 2 Wms. Saund. 47 c, and cases there cited; Smith v. Sleap, 12 M. & W. 585. 589.♦
(k) See the judgment in Elliott v. Kemp, 7 M. & W. 306.♦
(l) Armory v. Delamirie, 1 Stra. 504; Burton v. Hughes, 2 Bing. 173; Brancker v. Molyneux, 3 Scott, N. R. 332; Sutton v. Buck, 2 Taunt. 302; Arnold v. Jefferson, 1 Lord Raym. 275. See Roberts v. Wyatt, 2 Taunt. 268.
(m) Rooth v. Wilson, 1 B. & Ald. 59, which was an action on the case by a gratuitous bailee; Nicolls v. Bastard, 2 Cr. M. & R. 659, cited arg. Howarth v. Tollemache, 5 Scott, N. R. 332.
(n) Per Parke, B., 2 Cr. M. & R. 663; Flewellin v. Rave, 1 Bulstr. 68; 2 Bla. Com. 452, 453. See Knight v. Legh, 4 Bing 589.[b]
(o) Franklin v. Neate, 13 M. & W. 481. 485.♦

[a] Eng. Com. Law Reps. 13. [b] Id. 13. ♦Reprinted at $2.50 per vol.

destruction or conversion of the chattel, just as in the case of a carrier the original employer is the person to sue for the loss, for negligent carriage, or other breach of contract; the other subsequent purchaser for the conversion after the purchase."(*p*)

253. But trover will not in general lie, at suit of the owner, for goods which have been let to hire or demised for an unexpired term,(*q*) though, for consequential damage to them, he would be entitled to sue as reversioner.(*r*) If, however, the right of possession reverts to the bailor by the wrongful act of the bailee, the former may thereupon maintain trover for the goods; ex. gr.; A. conveyed goods by bill of sale to B. who allowed A. [*206 *c*] *to use the goods on payment of a weekly rent, A. undertaking to deliver them up on demand. A. afterwards sold and delivered the goods to C., a bona fide purchaser:—Held, that B. might maintain trover against C.(*s*) Here, it will be observed, the bailor became entitled to the immediate possession of the goods by the tortious act of the bailee; and in order that he may maintain trover, it is necessary that he should be so entitled. Where therefore A., being indebted to B., conveyed to him all his stock in trade, &c., absolutely by a bill of sale (under seal), which was executed bona fide, and this bill of sale contained a covenant by A. to pay the debt *on demand*, and a proviso for redemption on payment of the debt and interest on demand, together with a further proviso that the assignor should contiue in possession until default, the goods having been seized under a fi. fa. whilst in the possession of A., and before any demand made by B.: it was held, that B. had not such a right of immediate possession as to entitle him to maintain trover against the sheriff.(*t*)

253 *a*. It frequently happens that the right to maintain trover for chattels depends upon a question of fact, viz., whether or not a certain specified condition has been performed by the plaintiff, the performance of such [*206 *d*] *condition being precedent to the complete vesting of the property in him.(*u*) Such questions in practice frequently arise as between the creditor and the assignees of a bankrupt, the creditor claiming to be entitled to the goods which are the subject-matter of the action by virtue of a bonâ fide sale to him, and the contention on the part of the assignees being that such alleged sale was incomplete in consequence of the failure by the creditor in performing some condition precedent before the date of the act of bankruptcy to which the title of the assignees relates. A similar question may likewise arise in an action of trover by the execution creditor against the sheriff, in which case the sheriff will not in general be precluded from setting up the title of the assignees as an answer to the action,

(*p*) Judgment, 13 M. & W. 485, 486.♦

(*q*) Gordon v. Harper, 7 T. R. 9; Bloxam v. Sanders, 4 B. & C. 941;[c] Milgate v. Kebble, 3 Scott, N. R. 358; Pain v. Whittaker, 1 Ry. & M. 99.[d]

(*r*) See Attersoll v. Stevens, 1 Taunt. 190; and see further as to case, post, ss. 261. 268.

(*s*) Cooper v. Willomatt, 1 C. B. 672, recognising Loeschman v. Machin, 2 Stark. N. P. C. 311,[e] cited 5 Bing. 307,[f] and distinguishing Gregg v. Wells, 10 A. & E. 90; Scott v. Newington, 1 M. & Rob. 252.

(*t*) Bradley v. Copley, 1 C. B. 685, recognising Gordon v. Harper, 7 T. R. 9.

(*u*) Wilmhurst v. Bowker, 5 B. N. C. 541,[g] the judgment in which case was reversed in error, 8 Scott, N. R. 571, although the correctness of the general principle laid down by the court of Common Pleas was admitted.

[c] Eng. Com. Law Reps. 10. [d] Id. 21. [e] Id. 3. [f] Id. 15. [g] Id. 35.

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and their title may be given in evidence under "not possessed;" for the plaintiff can only recover in trover upon shewing that he has the property either absolute or special in the goods that are the subject of the action, and also a right of possession; and this property and possession are put in issue by the above plea, which will be established by shewing that the goods at the time of the conversion were the property of third persons.(x) On the same principle which has been illustrated by us in the preceding remarks, and which is of general application, it has been held that the owner of *an indenture, assigned by way of security for the repayment of money, cannot, until the condition is satisfied, maintain trover for its recovery;(q) and, as between vendor and vendee, the rule is, that the sale of a specific chattel on credit, though such credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid, but default in payment does not rescind the contract, unless conditional words be expressly introduced into the bargain.(r) [*207]

254. But where a tenant has a qualified possession only, as in chattels annexed to the freehold, and forming parcel of the inheritance, which determines on their being wrongfully severed, or in trees, the property in which, when detached from the soil by the wrongful act of the tenant, or by the act of God, vests in the person entitled to the first estate of inheritance;(s) in these and similar cases, the party who has the right of possession in the goods may sue for their conversion, even during the continuance of the term.(t) And for the same reason, lessor of tenant from year to year, although *there be no reservation of the timber on the premises, may bring trespass against a third person for carrying it away after it has been cut down:(u) but not so if he has himself wrongfully severed trees unfit for timber, and which, therefore, if blown down, would have belonged to the tenant, for he could not, by so doing, acquire any right to them.(v) Where trees are excepted in the lease, the tenant has of course no property in them, even of a qualified kind;(w) and, in this case, the land on which the trees grow, being likewise necessarily excepted, the lessor may maintain trespass for breaking his close and cutting down the trees.(x) [*208]

255. If the real owner of goods stands by and voluntarily allows another

(x) See per Maule, J., in Leake v. Loveday, 5 Scott, N. R. 925.

(q) Owen v. Knight, 4 Bing. N. C. 54; Isaac v. Belcher, 5 M. & W. 139; Wilmshurst v. Bowker, 5 Bing. N. C. 541,[h] and 3 Scott, N. R. 272; Milgate v. Kebble, 3 Scott, N. R. 358.

(r) Martindale v. Smith, 1 A. & E., N. S. 389. 395,[i] and cases there cited; Dixon v. Yates, 5 B. & Ad. 313,[k] supra, n. (q).

(s) Berry v. Heard, Cro. Car. 242; Evans v. Evans, 2 Camp. 491. A tenant for life without impeachment of waste is entitled to timber when severed from the estate, Co. Litt. 220, a.; Pyne v. Dor, 1 T. R. 55.

(t) Farrant v. Thompson, 5 B. & Ald. 826. 828;[l] Per Lawrence, J., Gordon v. Harper, 7 T. R. 13; Blackett v. Lowes, 2 M. & S. 494; 1 Wms. Saund. 322, n. (5); Blaker v. Anscombe, 1 Bos. & P., N. R. 25.

(u) Ward v. Andrews, 2 Chitt. R. 636;[m] Evans v. Evans, 2 Camp. 491.

(v) Channon v. Patch, 5 B. & C. 897.[n]

(w) 1 Wms. Saund. 322 a, n. (5). See Legh v. Heald, 1 B. & Ad. 622.[o]

(x) Rolls v. Rock, cited, 2 Selw. N. P. 10th ed. 1314.

[h]Eng. C. L. Reps. 35. [i]Id. 41. [k]Id. 27. [l]Id. 7. [m]Id. 18. [n]Id. 12. [o]Id. 20.

to treat them as his own, whereby a third person is induced to buy them bonâ fide, the owner cannot recover such goods from the vendee, whom he has himself assisted in deceiving:(y) nor can a party, who negligently or culpably allows another to contract on the faith and understanding of a fact, which he can contradict, afterwards dispute that fact in an action against the person so contracting.(z) But as against a mere wrong-doer, who sells the [*209] goods which he has *taken and receives the proceeds, the party, from whose possession they were taken, may waive the tort, and maintain an action for money had and received, without proving any title to the goods beyond mere possession;(a) and, if the defendant was guilty of a series of trespasses, and not of one single wrongful act, the plaintiff may pursue different remedies for the different injuries; for the suing in trespass for one tort is no waiver of the right to sue for money had and received, to recover the value of goods taken under a prior tort.(b)

256. In determining as to the joinder or severance of parties suing for a tort, we must observe,(c) first, that where the legal interest, affected by the tortious act, is joint, the parties interested must sue jointly for compensation; as in the interest of part-owners of a chattel, who must join in suing for a tort thereto,(d) or, in trover for its conversion;(e) or, in the case of a bailment by two, who must join in detinue for the recovery of the chattel.(f) So, two churchwardens were held to sue jointly for a false return to a mandamus, on the ground that the mandamus and the prosecution and [*210] *charge thereof were joint.(g) And although, in general, partners must join in suing for a tort to the partnership property, yet it has been held that a partner, colluding with the stranger to injure the firm, may be omitted in an action on the case against such third person.(h)

257. Secondly, where several persons, who are severally interested, sustain a joint damage, they may sue either jointly or separately in respect thereof. In accordamce with which rule, it was held, that the several owners of mills might join in an action on the case, for not grinding corn thereat; for although their interest were several, yet the not grinding at any of their mills was an entire joint damage.(i) So the dippers at Tunbridge Wells were entitled to join in suing a person who exercised the office of a dipper, without being duly appointed; for, although severally entitled to receive gratuities for their own several use, yet, with regard to a stranger's disturbing them in their employment, they were all jointly con-

(y) Gregg v. Wells, 10 A. & E. 90;[p] Pickard v. Sears, 6 A. & E. 469.[q] (z) Id.
(a) Oughton v. Seppings, 1 B. & Ad. 241.[r] See the judgment in Clark v. Gilbert, 2 Bing. N. C. 357, 358;[s] Chitt. Contr. 3rd ed. 607.
(b) Powell v. Rees, 7 A. & E. 426.[t]
(c) Coryton v. Lithebye, 2 Wms. Saund. 116 a, n. (2). As to the mode of taking advantage of non-joinder of a plaintiff, see 1 Wms. Saund. 291 g, h.
(d) Sedgeworth v. Overend, 7 T. R. 279; Addison v. Overend, 6 T. R. 766; Child v. Sands, 1 Salk. 31.
(e) Bloxam v. Hubbard, 5 East, 407.
(f) Com. Dig. Abatement, (E. 12.)
(g) Ward v. Brampston, 3 Lev. 362; Green v. Pope, 1 Lord Qaym. 125; Pechell v. Watson, 8 M. & W. 691; post, s. 258.
(h) Longman v. Pole, 1 Moo. & Mal. 223. See s. 258.
(i) Coryton v. Lithebye, 2 Saund. R. 115.

[p] Eng. Com. Law Reps. 37. [q] Id. 33. [r] Id. 20. [s] Id. 29. [t] Id. 34.

cerned in point of interest.(*k*) So if a false return be made by the sheriff to the prejudice of several, by which they are put to a charge, they may join in an action;(*l*) and, if a charter be made to four, and one of them bails it, the bailor may sue alone in detinue for its recovery.(*m*)

*258. Thirdly, where the interest affected and the damage sustained are respectively several, there must be separate actions at suit of the parties injured; therefore, if the goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in an action of replevin.(*u*) So, in actions for torts to the person, the parties aggrieved must sue separately, as for assault and battery, or in case for slander or false imprisonment.(*o*) Where, however, persons are in a trading partnership, as bankers, or otherwise, they should sue jointly for damage resulting to the firm from words spoken,(*p*) or from a libel against them in respect of their business, though in such joint action damages cannot be given for the injury done to the private feelings of the members of the firm, but this separate damage must, according to the rule above stated, be sued for by the individual who has sustained it.(*q*) In like manner, joint-tenants or parceners may join for slander of the title to their estate; and two persons may bring a joint action for maliciously holding them to bail, if the complaint in the declaration be confined to the expenses jointly incurred in obtaining their *liberty, though in respect of the imprisonment, and the personal inconvenience resulting therefrom, they should sue separately:(*r*) and where an action on the case for maintenance was brought by several jointly, who had been the defendants in the previous action, and had employed one attorney, to the amount of whose bill of costs the verdict was confined, such action was held maintainable, the interest in the expenses of the defence being a joint and not a several damage.(*s*) [*211] [*212]

259. If one of several persons who are jointly interested dies, the remedy for an injury to the joint interest survives, and the personal representatives of the deceased must not be joined,—the rule being, as in the case of a partnership or community of interest, that the remedy survives, but not the right.(*t*) Where the right of action is joint and several, or several only, in case of death the personal representatives of the deceased

(*k*) Weller v. Baker, 2 Wils. 423; 2 Wms. Saund. 116 a, n. (2).
(*l*) Com. Dig. Abatement, (E. 12). (*m*) Id.
(*n*) Co Litt. 145, b.; 2 Selw. N. P. 10th ed. 1185.
(*o*) 2 Wms. Saund. 117 a; Smith v. Cooker, Cro. Car. 512; Worsley v. Charnock, Cro. Eliz. 472; Bac. Ab. Actions in General (C).
(*p*) Robinson v. Marchant, 15 L. J., N. S., Q. B. 135.
(*q*) See per Tindal, C. J., Williams v. Beaumont, 10 Bing. 270;[a] Harrison v. Bevington, 8 C. & P. 708. 713,[x] n. (*a*); Forster v. Lawson, 3 Bing. 452. 456. 458;[y] Gregory v. Williams, 1 Car. & K. 568;[z] Haythorn v. Lawson, 3 C. & P. 196;[b] Cooke v. Batchelor, 3 B. & P. 150. See Maitland v. Goldney, 2 East, 426; Solomons v. Medex, 1 Stark. N. P. C. 191.[c] As to actions of tort by a Corporation, see p. 228, note.
(*r*) Forster v. Lawson, 3 Bing. 455, 456;[d] Haythorn v. Lawson, 3 C. & P. 196;[e] Barratt v. Collins, 10 Moore, 446. 450; as to which case, see Pechell v. Watson, 8 M. & W. 696. 702.
(*s*) Pechell v. Watson, 8 M. & W. 691; Ward v. Brampston, 3 Lev. 362; Green v. Pope, 1 Lord Raym. 125.
(*t*) Per Dampier, J., Rex v. Collector of Customs, 2 M. & S. 225; Co. Litt. 182, a.

[a]Eng. Com. Law Reps. 25. [x]Id. 34. [y]Id. 13. [z]Id. 47. [b]Id. 14. [c]Id. 2. [d]Id. 13. [e]Id. 14.

may sue, provided the rule *actio personalis moritur cum personâ* does not apply.(*u*)

260. It will be collected from the preceding observations that the party, whose legal interest has been affected, is the proper plaintiff in suing for a tort, and, consequently, the right of action for an injury, either to the person or to property, cannot, in any case, be assigned. But the assignee of pro-
[*213] perty must sue *for any tort committed subsequently to the assignment, as in detinue for title deeds, though delivered by the assignor to a third party previously to the assignment of the estate: for, when the action was commenced, the property was in the assignee;(*y*) and the same rule applies in trover,(*z*) and in case for the infringement of a copyright,(*a*) the vendee of goods in the former case, and the assignee of the copyright in the latter, being the proper parties to sue for any injury to their respective property. On the death of the party injured we shall see that the remedy, if any, vests in his personal representatives; and that the heir or devisee cannot maintain an action for a tort committed in the lifetime of the ancestor or devisor,(*b*) unless it be continuing as a nuisance, in which case either the heir or devisee, it seems, may sue for the injury incurred subsequently to the death of the ancestor or devisor.(*c*)

[*214]

*CHAPTER II.

1. LANDLORD AND TENANT, ss. 261—270.
2. PRINCIPAL AND AGENT—MASTER AND SERVANT, ss. 271—277.

1.—Landlord and Tenant.

Right of the Landlord to sue, s. 261. Where the Parties interested in the demised Premises are Joint-Tenants, Coparceners, or Tenants in Common, ss. 262—266. Who should sue after Assignment of the Reversion, s. 267. Right of the Tenant to sue—Change of tenancy, &c., ss. 268—270.

261. For a tortious act done to a demised estate, both the landlord and tenant have remedies which are separate and distinct in kind, the former being entitled to sue for injury, if any, to the reversion, and the latter for the damage to the estate in possession.(*aa*) In order, however, to maintain an action on the case at suit of the landlord, the declaration must state an injury of such a permanent nature as to be necessarily injurious to his reversion, or must allege the injury declared on to have been done to the damage

(*u*) Broom's Legal Maxims, 400.
(*y*) Philips v. Robinson, 4 Bing. 106.[f]
(*z*) See Pattison v. Robinson, 5 M. & S. 105; Friday v. Hart, cited Chitt. Plead. 5th ed. 77.
(*a*) Cumberland v. Planché, 1 A. & E. 580;[g] Power v. Walker, 3 M. & S. 7.
(*b*) 2 Inst. 305; 2 Wms. Saund. 252 a, n. 7.
(*c*) Some v. Barwish, Cro. Jac. 231; post, s. 267.
(*aa*) Bedingfield v. Onslow, 3 Lev. 209; Holt, N. P. C. 545, n.;[h] post, s. 268. See Vallance v. Savage, 7 Bing. 595.[i]

[f]Eng. Com. Law Reps. 13. [g]Id. 28. [h]Id. 3. [i]Id. 90.

of the reversion,(*b*) and some damage done thereto must be found by the jury.(*c*) A simple entry on land, however, even if *accompanied by a claim of right of way, is not necessarily injurious to the reversion.(*d*) Further it must appear upon the face of the declaration, that the plaintiff is entitled to a reversionary interest of some description,(*e*) and, according to the nature of this interest, will the amount of damages be regulated; so that a reversioner for a life estate can only recover such damages, for an injury done to the estate, during the terms of a lease, as are equivalent to the injury done to the life estate;(*g*) and where a nuisance affecting the reversionary estate is continued, recovery in one action will be no bar to another for continuing the nuisance.(*h*) [*215]

262. Joint-tenants and parceners, during the continuance of the joint estate,(*i*) must join in all actions ex delicto relative thereto;(*k*) as, in trespass to their land,(*l*) and in trover or replevin(*m*) for their goods. So, co-heirs in gavelkind must join in trespass qu. cl. fr.(*n*) Where a farm was demised to A. and B. jointly, and A. by agreement underlet part of it to C., and gave receipts *for payment of rent, and a notice to quit in his own name only, it was held, that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the premises demised.(*o*) As between joint-tenants and co-parceners trespass does not lie in respect of the joint estate, for each has an equal right to enter on any part of it;(*p*) nor can trover be maintained, for the possession of one is the possession of all.(*q*) [*216]

263. We have already considered under what circumstances tenants in common should join or sever in a demise in ejectment against third parties:(*r*) as between themselves, this action will only lie in case of an actual ouster, or of such an occupation by one co-tenant as amounts thereto.(*s*) Demand of possession by one tenant in common and a refusal by the co-tenant, who stated that he claimed the whole estate, was held evidence of an actual ouster.(*t*) Where a person demised mines to a company of

(*b*) Jackson v. Pesked, 1 M. &. S. 234; Tucker v. Newman, 11 A. & E. 40.[k] As to trover or trespass by the landlord for trees severed from the land, ante, s. 254.

(*c*) Young v. Spencer, 10 B. & C. 145;[l] per Best, C. J., Strother v. Barr, 5 Bing. 153;[m] Tucker v. Newman, 11 A. & E. 40.[k]

(*d*) Baxter v. Taylor, 4 B. & Ad. 72. 76.[n] See Alston v. Scales, 9 Bing. 3;[o] per Patteson, J., 11 A. & E. 43.[p]

(*e*) Martin v. Goble, 1 Camp. 320.

(*g*) Evelyn v. Raddish, Holt, N. P. C. 543;[q] Woodfall, L. & T. 4th ed. 665.

(*h*) Shadwell v. Hutchinson, 2 B. & Ad. 97;[r] ante, s. 248, ad finem.

(*i*) As to the severance of these estates, 2 Bla. Com. 185. 189.

(*k*) 1 Wms. Saund. 291 g., h.; 2 Id. 117 a.; Bac. Ab. Joint-Tenants, (K.); 2 Bla. Com. 182. 188. As to the action of ejectment, ante, ss. 30, 31.

(*l*) Bac. Ab. Joint-Tenants, (K.).

(*m*) 3 Salk. 205; Nelthorpe v. Dorrington, 2 Lev. 113; Woodfall, L. & T. 4th ed. 708, 709.

(*n*) Deering v. Moor, Cro. Eliz. 554.

(*o*) Steel v. Western, 7 Moore, 29.

(*p*) 2 Bla. Com. 183. 188.

(*q*) 2 Selw. N. P. 10th ed. 1364; Brown v. Hedges, 1 Salk. 290. As to the action for waste between joint-tenants and parceners, see 2 Bla. Com. 188; Co. Litt. 200, b.

(*r*) Ante, s. 34.

(*s*) Litt. s. 322; Doe d. White v. Cuff, 1 Camp. 173; Reading's case, 1 Salk. 392; S. C. 2 Lord Raymond, 829; Doe d. Wawn v. Horn, 3 M. & W. 333;[s] S. C. 5 M. & W. 564;[s] Per Littledale, J., Cubitt v. Porter, 8 B. & C. 269.[s]

(*t*) Doe d. Hellings v. Bird, 11 East, 49; Per Lord Mansfield, C. J., Fisher v. Prosser, Cowp. 217.

[k]Eng. Com. Law Rep. 39. [l]Id. 21. [m]Id. 15. [n]Id. 24. [o]Id. 23. [p]Id. 39. [q]Id. 3. [r]Id. 22. [s]Id. 15. [s]Reprinted at $2.50 per vol.

which he afterwards became a member, and of which he actually was a member on the day on which the demise was laid, though it did not appear [*217] *that he had ever been in possession as one of the company, it was held that he might recover in an ejectment against another partner who defended on behalf of the company.(*u*) The action for mesne profits may, after recovery in ejectment, be brought by one tenant in common against his co-tenant,(*x*) and it has been held, that a tenant in common may distrain upon his co-tenant, being the assignee of his lessee.(*y*)

264. As against a third party, tenants in common should join in trespass qu. cl. fregit,(*z*) although a judgment in ejectment has been previously obtained on their several demises, for this is not inconsistent with the fact of the tenancy in common.(*a*) So, they must join in trespass for taking away their common property,(*b*) or for an entry upon their land;(*c*) and wherever the subject-matter of the tenancy is one entire thing—as, in detinue of charters, tenants in common must join in suing for its recovery or for an injury done to it.(*d*) Hence they must join in a quare impedit, [*218] for *the presentation is entire;(*e*) and if one of two part-owners of a chattel sue alone for a tort to the chattel held in common, and the defendant do not plead in abatement,(*f*) he cannot afterwards so plead in an action by the other part-owner.(*g*) Tenants in common cannot join in an action of replevin for their several chattels.(*h*)

265. Trespass does not lie by one tenant in common against his co-tenant,(*i*) unless there be a total destruction of the common property, as of the deer in their park, or the flight of doves in their dove-house;(*k*) neither will trover lie between these parties for a chattel held in common,(*l*) unless a total destruction or wrongful conversion can be proved.(*m*) And, although a sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another who is tenant in common with him, will not, in point

(*u*) Francis v. Doe d. Hervey (in error), 4 M. & W. 331.♦
(*x*) Goodtitle v. Tombs, 3 Wils. 118.
(*y*) Snelgar v. Helston. See Tew v. Jones, 13 M. & W. 12.♦
(*z*) Litt. s. 315; Com. Dig. Abatement. (E. 10). As to the action of account between tenants in common, see Sturton v. Richardson, 13 M. & W. 17.♦
(*a*) Chamier v. Clingo, 5 M. & S. 64.
(*b*) Hare v. Celey, Cro. Eliz. 143; Litt. s. 315.
(*c*) Com. Dig. Abatement (E. 10); Bac. Ab. Joint-Tenants (K.); Some v. Barwish, Cro. Jac. 231.
(*d*) Bac. Ab. Joint-Tenants (K.); Co. Litt. 197, b.; infra, n. (*g*). In detinue the non-joinder cannot be given in evidence under a plea denying plaintiff's property in the chattel, Broadbent v. Ledward, 11 A. & E. 209,[t] cited Mason v. Farnell, 12 M. & W. 674. 684,♦ which was detinue by tenant in common against his co-tenant. As to giving a lien in evidence under "non detinet," or "not possessed," see Barnewell v. Williams, 8 Scott, N. R. 120; Lane v. Tewson, 12 A. & E. 116;[u] Cannee v. Spanton, 8 Scott, N. R. 714.
(*e*) Co. Litt. 197, b. (*f*) See Phillips v. Claggett, 10 M. & W. 102.♦
(*g*) Sedgworth v. Overend, 7 T. R. 279; Addison v. Overend, 6 T. R. 766.
(*h*) Woodfall, L. & T. 5th ed. 714.
(*i*) Litt. s. 323; Bennington v. Bennington, Cro. Eliz. 157; Cubitt v. Porter, 8 B. & C. 257;[x] Com. Dig. Abatement (F. 6).
(*k*) Co. Litt. 200, a., b.; Com. Dig. Estates (K. 8); Waterman v. Soper, 1 Lord Raymond, 737, as to which case see Holder v. Coates, 1 Moo. & Mal. 112; infra, n. (*k*).
(*l*) Selw. N. P. 10th ed. 1366; West v. Pasmore, there cited.
(*m*) Higgins v. Thomas, 15 L. J. N., Q. B., 261, and cases there cited; Holliday v. Camsell, 1 T. R. 658; Brammell v. Jones, cited 2 Selw. N. P. 10th ed. 1365; Fennings v. Lord Grenville, 1 Taunt. 241; Smith v. Stokes, 1 East, 363; Smith v. Oriell, Id. 368.

[t]Eng. Com. Law Reps. 39. [u]Id. 40. [x]Id. 15. ♦Reprinted at $2.50 per vol.

of law, [and per se] be necessarily equivalent to an ouster or destruction *of the subject-matter of the tenancy,(*l*) yet the general proposition seems true, that a sale by one of two tenants in common of the whole of their property is a conversion as to the share of the other, provided the sale be so affected as to deprive that other of his interest in the chattel sold.(*m*) [*219]

266. An action on the case in the nature of waste lies by one tenant in common against his co-tenant for any misfeasance injurious to the common property;(*n*) and if there be two tenants in common of a tree, which is cut down by one of them, although the other cannot have an action for the tree, yet he may sue for the special damage occasioned by the tortious act:(*o*) and this action may be maintained by one tenant in common against another, who has improperly pulled down a wall, the common property of both, or who has done waste,—the tenancy being, in a wood, turbary, or piscary.(*p*)

267. After assignment by the original reversioner, the assignee is the proper plaintiff, in suing for an injury to the reversionary interest in the demised property,(*p*) *provided such injury were committed during the continuance of his estate as assignee, and not prior to its commencement;(*r*) as, for diverting a water-course, where the declaration stated the locus in quo to be in the possession of one J. S., as tenant to the plaintiff, and proof was given of a mortgage from J. S., the tenant for life, to the plaintiff, who was entitled to the reversion.(*s*) So, a mortgagee of a lessee was held entitled to declare in case as reversioner against the assignee of the lessee (who had become bankrupt), for improperly removing fixtures.(*t*) A devisee or heir likewise may sue for a nuisance erected in the testator's lifetime, but continued after his death;(*u*) and a remainderman for damage occasioned by undermining a wall during tenancy for life, which fell after the plaintiff's title accrued, the excavation having been continued.(*x*) [*220]

268. The reversioner, then, being the proper party to sue for the injury to the reversion, it remains to add that, for the injury to the possession, the tenant must recover damages;(*y*) and in either case, such damages will be commensurate with the injuries which the respective interests *have sustained.(*z*) Hence, a copyholder, although he has no property [*221]

(*l*) Heath v. Hubbard, 4 East, 110; Barnardiston v. Chapman, cited Id. 121; Graves v. Sawcer, T. Raymond, 15.

(*m*) See per Parke, B., Farrar v. Beswick, 1 M. & W. 685. 688;* Barton v. Williams, 5 B. & Ald. 395,[z] affirmed on error, 3 Bing. 139.

(*n*) Martyn v. Knowllys, 8 T. R. 145, 146.

(*o*) Per Holt, C. J., Waterman v. Soper, 1 Lord Raymond, 737.

(*p*) Per Littledale, J., Cubitt v. Porter, 8 B. & C. 270;[a] Co. Litt. 200, b.; Per Tindal, C. J., delivering the judgment of the Court in Badbee v. Mayor, &c., of the City of London, 11 Law Journ., N. S., C. P. 221.

(*q*) Penruddock's case, 5 Rep. 101 a. (*r*) 2 Wms. Saund. 252 a, n. (7.)

(*s*) Partridge v. Bere, 1 Dowl. & R. 272; S. C. 5 B. & Ald. 604.[b] As between mortgagor, mortgagee, and tenant, ante, ss. 41—45.

(*t*) Hitchman v. Walton, 4 M. & W. 409.*

(*u*) Some v. Barwish, Cro. Jac. 231; Penruddock's case, 5 Co. 101 a.

(*x*) Gillon v. Boddington, 1 Ry. and Mo. 161,[c] recognized, Howell v. Young, 5 B. & C. 268.[d]

(*y*) Jesser v. Gifford, 4 Burr. 2141; Beddingfield v. Onslow, 3 Lev. 209; Attersoll v. Stevens, 1 Taunt. 183. 190.

(*z*) Selw. N. P. 10th ed. 1117; Woodfall, L. & T. 4th ed. 664—666.

[z]Eng. Com. Law Reps. 7. [a]Id. 15. [b]Id. 7. [c]Id. 21. [d]Id. 11.
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in minerals, has a sufficient possession to entitle him to maintain trespass against a wrong-doer, and may recover substantial damages for any actual injury done to the surface of the land, and nominal damages for a trespass committed below the surface.(*a*)

269. If, however, there be a surrender of the tenancy by operation of law, the right to sue for a tort to the premises previously demised will vest exclusively in the owner of the soil; therefore, where the tenant of a ferry, finding it unprofitable, agreed with the owner to become his servant at fixed wages, and to account to him for all money received from passengers, it was held, that case for disturbing the ferry was rightly brought in the name of the owner; for a new relation had taken place, with the consent of both parties, wholly inconsistent with that of landlord and tenant.(*b*) So, a servant, who is put into the occcupation of a cottage, with less wages on that account, does not occupy as tenant; and in case for disturbing a right of way, the occupation may properly be laid as that of the master.(*c*)

270. In case of a change of tenancy, the proper remedy for any mismanagement of the land during the former term belongs to the landlord, [*222] and not to the *incoming tenant;(*d*) and the latter could not, it was consequently held, maintain trover for the away-going crop to which the off-going tenant had forfeited his title by non-compliance with the terms of his lease.(*e*) Where an outgoing tenant had contracted with his landlord to leave the manure on the premises, and to sell it to the incoming tenant at a valuation, it was held, that the outgoing tenant had a right of onstand for the manure on the farm, and that, both the possession and property remaining in him until the valuation was made, he was entitled to bring trespass against the incoming tenant, who, previously to such valuation, removed and used it.(*g*)

2.—Principal and Agent—Master and Servant.

General Rule.—Instances of its application, ss. 271—274. Consignor, Consignee, and Carrier, s. 275. Right of Action of Master for an Injury to his Servant, ss. 276, 277.

271. Since either a general or a special property is sufficient to support an action of trover for the recovery of goods, and since, for an injury done to them, trespass will ordinarily lie at suit of the party in possession,(*h*) it follows that, as a general rule, these forms of action may be supported, either by the principal and general owner of goods, or by the agent and

(*a*) Lewis v. Branthwaite, 2 B. & Ad. 437. 444.*
(*b*) Peter v. Kendal, 6 B. & C. 703. 710.†
(*c*) Bertrie v. Beaumont, 16 East, 33. See Martin v. Goble, 1 Camp. 320.
(*d*) Boraston v. Green, 16 East, 71. See Griffiths v. Pulleston, 13 M. & W. 358.♦
(*e*) Ib.
(*g*) Beaty v. Gibbons, 16 East, 116. See Woodfall, L. & T. 4th ed. 497.
(*h*) Ante, ss. 249. 251.

*Eng. Com. Law Reps. 22. †Id. 14.
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special owner entrusted *therewith.(*t*) Thus, a carrier, who is the mere instrument of conveyance, may maintain trover against a stranger who takes the goods out of his possession ;(*k*) and so may a factor,(*l*) a warehouseman who has goods for safe custody only,(*m*) an auctioneer who has a possession coupled with an interest in the property which he is appointed to sell,(*n*) or an indorsee of a bill of lading, for the purpose of effecting a stoppage in transitu on behalf of the vendor.(*o*) In like manner, a trustee,(*p*) pawnee,(*q*) or gratuitous bailee,(*r*) respectively may sue for a tort to the chattel held in trust or on bailment. [*223]

272. In addition to the above instances, an agister of cattle may maintain trover against a stranger who takes them away ;(*s*) and a shopkeeper may have trespass for *taking goods sent to him on sale or return.(*t*) So, the master of a fly-boat, who was hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, and whereby it was being towed, although the vessel and the rope were the property of the company.(*u*) Where, however, a person sends his servant to distrain for rent, and the servant distrains cattle and impounds them, and a stranger takes them out of the pound, the action for the pound-breach must be brought by the master, and not by servant or pound-keeper ; and if the cattle are rescued from the servant, the master is the proper party to sue, for he sustains the injury.(*x*) [*224]

273. Where a bill of exchange was drawn by A. on, and accepted by B., for the purpose of being discounted, and having the proceeds applied to the payment of other bills, which, however, before they became due, were paid by B., who thereupon directed A. to hold the first mentioned bill to his use, and not to part with it without his authority, but A. for his own purposes indorsed it to C., having previously stated that it belonged to B., and that he had no authority to part with it ; the Court held, that, although B. could not have recovered on the bill, he might, nevertheless, as having the property therein, maintain trover for its conversion.(*y*) So, trover will lie for bills of exchange indorsed to an agent of the plaintiffs

(*i*) Per Lord Loughborough, C. J., 1 H. Bla. 85 ; Per Lawrence, J., 8 T. R. 334 ; Per Grose, J., 7 T. R. 12 ; 2 Wms. Saund. 47 e.

(*k*) Per Lord Ellenborough, C. J., Martini v. Coles, 1 M. & S. 147 ; Arnold v. Jefferson, 1 Lord Raymond, 275, 276 ; 1 Roll. Ab. 4 (I.), pl. 1.

(*l*) Williams v. Millington, 1 H. Bla. 85.

(*m*) Per Lord Ellenborough, C. J., 1 M. & S. 147.

(*n*) Williams v. Millington, 1 H. Bla. 81. 84.

(*o*) Morison v. Gray, 2 Bing. 260,[s] distinguishing Waring v. Cox, 1 Camp. 369, and Coxe v. Harden, 4 East, 211 ; Cuming v. Brown, 9 East, 506. But the unpaid vendor has a right of stoppage in transitu as against the vendee's agent, the latter party being also indorsee of the bill of lading. Patten v. Thompson, 5 M. & S. 359, and cases there cited. See Bryans v. Nix, 4 M. & W. 775.♦

(*p*) 2 Wms. Saund. 47 b, n. (*q*) Com. Dig. Trespass, (B. 4.)

(*r*) Rooth v. Wilson, 1 B. & Ald. 59.

(*s*) Com. Dig. Trespass, (B. 4).

(*t*) Colwill v. Reeves, 2 Camp. 575.

(*u*) Moore v. Robinson, 2 B. & Ad. 817 ;[h] Per Holt, C. J., Pitts v. Gaince, 1 Salk. 10.

(*x*) 1 Selw. N. P. 10th ed. 678, 679.

(*y*) Evans v. Kymer, 1 B. & Ad. 528. 535.[i]

[s]Eng. Com. Law Reps. 9. [h]Id. 22. [i]Id. 20.

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[*225] or order, for their account, and deposited with *the defendants by such agent as a security for past and future advances by the defendants to him.(y)

274. Where a loss accrues to the principal by reason of fraud practised on, or negligence committed towards, his agent, an action on the case will lie at suit of the former, to recover damages, from the party practising the the fraud,(z) or guilty of the negligence.(a)

275. The rule already laid down(b) in actions of contract, viz. that the consignee and vendee of goods is the proper party to sue the carrier by whom they are transmitted, holds also in actions founded on tort, and the consignor cannot maintain case or trover against the carrier for their loss, although he paid for booking them, because this was done merely as agent, for the vendee.(c) So, if the goods are lost in transitu, such loss will fall on the consignee, although the particular carrier employed had not been named by him.(d) And if A. order goods to be transmitted to him by a particular carrier, though upon condition to return them again if he dislike them; yet, upon delivery to the carrier the property is vested in A., and [*226] he will be bound to pay the price to the *vendor; and, consequently, the vendor cannot bring trover against the carrier if he convert the goods to his own use.(e) But where goods are merely sent for approval, no property passes:(g) and where goods were sent by a carrier to an agent who was to forward them to the consignee abroad, and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was held, that trover might be maintained against the carrier at the suit of the consignor.(h)

276. To the relation between master and servant, and the right accruing therefrom, there are two species of injuries incident:—First, the enticing away an apprentice before the term of apprenticeship has expired; in which case the master has a remedy against the person who caused the breach of contract, either in case for the tort, or in assumpsit for the work and labour of the apprentice, and likewise against the servant for his breach of the agreement:(i) and secondly, the occasioning a personal injury to the servant, and thereby affecting the property which the master has, by his contract, acquired in the labour of the servant; in which case, besides the remedy which the latter himself may have as an individual, the master also may recover damages from the

(y) Treuttul v. Barandon, 8 Taunt. 100, recognized 1 B. & Ad. 535.[k] See Sigourney v. Lloyd, 8 B. & C. 622,[l] affirmed in error, 5 Bing. 525;[m] Foster v. Pearson, 1 Cr. M. & R. 855. (z) Tracy v. Veal, Cro. Jac. 223.

(a) Beedle v. Morris, Cro. Jac. 224; ante, ss. 61. 191. (b) Ante, s. 66.

(c) Dawes v. Peck, 8 T. R. 330; Wilbraham v. Snow, 2 Wms. Saund. 47 a, n. (1).

(d) Per Lord King, C., Godfrey v. Furzo, 3 P. Wms. 185, 186; Snee v. Prescott, 1 Atk. 248; Dutton v. Solomonson, 3 Bos. & P. 584; ante, s. 67. See per Wightman, J., Coates v. Chaplin, 11 Law Journ. N. S., Q. B. 317, and cases cited in the argument.

(e) Haynes v. Wood, cited 2 Selw. N. P. 10th ed. 1345. See Colston v. Woolston, cited Id.; Staples v. Alden, 2 Mod. 308.

(g) Swain v. Shepherd, 1 Moo. & Rob. 223, recognized in Coates v. Chaplin, 11 Law Journ., N. S., Q. B. 315.

(h) Tagliabue v. Wynn, cited 1 Selw. N. P. 10th ed. 408.

(i) 3 Bla. Com. 142; Foster v. Stewart, 3 M. & S. 191. See Bird v. Randall, 3 Burr. 1345.

[k] Eng. Com. Law Reps. 20. [l] Id. 15. [m] Id. 15.

wrong-doer for the loss of service, and for expenses *necessarily incurred in consequence of the tortious act;(k) and such damages [*227] may be given for loss of service, not only before action brought, but afterwards down to the time when, as it appears in evidence, the disability may be expected to cease.(l) Nor will the master's remedy be detroyed, by reason of the remoteness of the damage, although the remedy of the servant was only by an action on the case, and not by an action of trespass.(m)

277. So, a parent may recover for a tort done to the child, occasioning loss of service;(n) though for the personal injury the child alone can recover damages:(o) and trespass for the direct injury of debauching a servant or child, though married,(p) or only adopted,(q) or case for the consequential damage, is maintainable on the same grounds.(r) But some loss of service (though very slight is sufficient) must be shewn;(s) therefore, an action does not lie at suit of a parent for seduction of his *child whilst [*228] serving another as apprentice,(t) or whilst living in another person's family as servant, without any animus revertendi.(u) Where the declaration in an action on the case for the seduction of the plaintiff's daughter contained no allegation of loss of service, but was framed upon the stat. 43 Eliz. c. 2, s. 7, by which the father, when of sufficient ability, is bound to maintain his child, being poor and unable to work, the judgment was arrested on the ground that the gist of the action for seduction is the loss of service, and that the action can only be maintained in respect of the damage resulting therefrom.(v).

(k) 3 Bla. Com. 142. See Hall v. Hollander, 4 B. & C. 660.[n]

(l) Hodsoll v. Stallebrass, 11 A. & E. 301.[o]

(m) Martinez v. Garber, 3 Scott, N. R. 306.

(n) Hall v. Hollander, 4 B. & C. 660.[n] As to trespass for abduction of a child, 3 Bla. Com. 141; Barham v. Dennis, Cro. Eliz. 769, cited 4 B. & C. 662;[n] and see 5 M. & W. 516.♦

(o) Gladwell v. Steggall, 5 Bing. N. C. 733. 736.[p]

(p) Harper v. Luffkin, 7 B. & C. 387.[q]

(q) Irwin v. Dearman, 11 East, 23. See Edmondson v. Machell, 2 T. R. 4.

(r) 3 Bla. Com. 16th ed. 142, n. (20); Chamberlain v. Hazlewood, 5 M. & W. 515.♦

(s) Ib.; Per Parke, B., 2 M. & W. 542,[s] and 6 M. & W. 56;♦ Bennett v. Allcott, 2 T. R. 166; Judgment, Grinnell v. Wells, 8 Scott, N. R. 752; Torrence v. Gibbins, 5 Q. B. 297;[r] per Coleridge, J., Id. 300; Barrett v. Oliver, Q. B. June 20, 1846.

(t) Harris v. Butler, 2 M. & W. 539.♦

(u) Dean v. Peel, 5 East, 45; Speight v. Oliviera, 2 Stark. N. P. C. 493,[t] recognised per Parke, B., 2 M. & W. 542;♦ Blaymire v. Haley, 6 M. & W. 55.♦

(v) Grinnell v. Wells, 8 Scott, N. R. 741, where all the cases are cited. See Boyle v. Brandon, 13 M. & W. 738.♦ As to actions ex delicto by partners, see s. 258. A corporation may maintain ejectment (Adams on Ejectment, 4th ed. 57,) and may sue for a tort to the property of the corporation (see 1 Kyd on Corporations, 190, Mayor of Colchester v. Brooke, 15 L. J., N. S., Q. B., 59,) or for a penalty due under a bye-law (ante s. 89; see also Piper v. Chapell, 14 M. & W. 624.♦) As to actions by Churchwardens and Overseers, see Rumball v. Munt, 15 L. J., N. S., Q. B., 180; Ward v. Clarke, 12 M. & W. 747.♦

[n]Eng. Com. Law Reps. 10. [o]Id. 39. [p]Id. 35. [q]Id. 14. [r]Id. 48. [s]Id. 3

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*CHAPTER III.

HUSBAND AND WIFE—ALIEN—CIVIL DEATH.

When the Husband must sue alone, ss. 278—281. When the Wife may sue alone, s. 282. When the Husband may elect to sue alone or jointly with his Wife, ss. 283, 284. When the Husband and Wife must sue jointly, ss. 285—287. Alien, &c., ss. 288, 289.

278. THE husband must sue alone for all injuries to his own property and person,(*a*) for in these his wife has no legal interest; and it must be observed that such property includes personalty in possession of the wife before marriage, and such as subsequently accrues to the husband in her right;(*b*) therefore, the husband must sue alone, for carrying away corn grown on the real estate of the wife, but severed from the soil,(*c*) although, for the tortious act of cutting it, she might join by reason of her interest in the land.(*d*) So, tithes in right of the wife's rectory belong to the husband, when set out, and must be recovered by him alone in trover;(*e*) and hus-
[*230] band and wife cannot join in an *action of trover, and declare that they were both possessed of certain goods, and that defendant converted them to their damage, for the possession of the wife is the possession of the husband, and so is the property, and therefore the conversion is to the damage of the husband alone.(*g*)

279. It is however necessary to consider, in suing for goods which originally belonged to the wife dum sola, whether they have been reduced into the husband's possession or not; if they have been so reduced, he must sue alone for them, if the contrary, he may elect to sue jointly with his wife;(*h*) and in this case the true test is, whether the right of action would survive to the wife.(*i*) But in detinue for goods of a feme covert, which came to defendant's hands before marriage, and the property in which was thereupon transferred by law to the husband, it is laid down that the husband must sue alone;(*k*) although it is said that the wife may join for detention of a deed by which an annuity is granted to her, on account, as it should seem, of her interest in the annuity thereby secured.(*l*) So, replevin can-
[*231] not be supported by husband and wife, without shewing in *the declaration the nature of the wife's interest, as that the chattels belonged to her in autre droit, or alleging that the taking was before the cover-

(*a*) Newton v. Hatter, 2 Lord Raymond, 1208; Marshal v. Doyle, Cro. Jac. 473; Talbot v. Bacon, 1 Lev. 3; Dunwell v. Marshall, 2 Lev. 20; 3 Bla. Com. 143.

(*b*) Ante, s. 94; Tugman v. Hopkins, 11 Law Journ., N. S., C. P. 309.

(*c*) Arundel v. Short, Cro. Eliz. 133. But see Com. Dig. Pleader, (2 A. 1); Cookson v. Castline, Cro. Eliz. 96.

(*d*) Com. Dig. Pleader, (2 A. 1); Cockson v. Castline, Cro. Eliz. 96.

(*e*) Com. Dig. Bar. and Feme, (W.). See Ford v. Pomeroy, Noy, 136.

(*g*) Nelthrop v. Anderson, 1 Salk. 114.

(*h*) Arundel v. Short, Cro. Eliz. 133. See Ayling v. Whicher, 6 A. & E. 259. 264;[t] post, ss. 284, 285.

(*i*) Per Lord Denman, C. J., and Coleridge, J., 6 A. & E. 264.[t]

(*k*) Bac. Ab. Detinue, (A.), Bar. and Feme, (K.); 1 Selw. N. P. 10th ed. 656; Woodfall, L. & T. 4th ed. 578.

(*l*) Bac. Ab. Detinue, (B.). Held, that she ought to join in trover for a deed, granting a rent-charge to her dum sola, though the finding was during coverture, Bac. Ab. Bar. and Feme, (K.); Com. Dig. Bar. and Feme, (V.).

[t]Eng. Com. Law Reps. 33.

ture, in either of which cases she might be joined,(*m*) though after verdict such an interest would perhaps be intended.(*n*)

280. For torts to the person of the wife, the declaration may either seek compensation for the immediate and direct injury to the wife, in respect of which a right of action would survive to her, or for the consequential and special damage to the husband; in the former case, the husband and wife must join,(*o*) in the latter, the husband must sue alone.(*p*) Therefore, in trespass by both jointly, for an assault on the wife, the surgeon's bill cannot be recovered;(*q*) and for this, as well as for compensation for the loss of the wife's society and services occasioned thereby,(*r*) or resulting from criminal conversation with her,(*s*) or from her abduction,(*t*) false *imprisonment or malicious prosecution,(*u*) the husband alone must [*232] sue; but in his declaration he may likewise recover for a personal tort to himself; so that although an action could not be maintained for the battery of husband and wife, by both jointly, because for the battery of the husband the wife ought not to join,(*x*) yet the husband may sue alone for the assault on himself and for the consequential damage resulting from the personal wrong to his wife.(*y*) So, husband and wife cannot recover in the same action for an assault on the wife, and for taking the goods of the husband.(*z*)

281. In like manner, in case for slander of the wife, if the words are actionable per se, although the husband and wife must join for the direct injury,(*a*) yet the husband should sue alone for consequential damage,(*b*) as he must also do if the words are not actionable per se, but only by reason of special damage.(*c*) Hence, in the former case, special damage cannot be recovered by husband and wife, for loss of service by the wife, for this is to the husband's sole damage;(*d*) and in the *latter, i. e. [*233] if the words are not actionable in themselves, an action does not lie at suit of husband and wife, for injury to a business carried on by the latter living separate from her husband, for the profits of such business accrue to him alone.(*e*) If the husband survive he may sue for any tort to the wife's

(*m*) Serres v. Dodd, 2 Bos. & P. N. R. 405. 407; Com. Dig. Pleader, (3 K. 10).
(*n*) Bourn v. Mattaire, Ca. temp. Hardw. 119; Selw. N. P. 10th ed. 295; Com. Dig. Pleader, (3 K. 10).
(*o*) Per Tauntou, J., Saville v. Sweeny, 4 B. & Ad. 523;[a] 3 Bla. Com. 140; post, s. 286.
(*p*) Per Taunton, J., 4 B. & Ad. 523;[a] 3 Bla. Com. 140. See the forms, Chitt. jun. Pl. 718.
(*q*) Per Lord Abinger, C. B., Dengate v. Gardiner, 4 M. & W. 7;[b] Chitt. jun., Plead. 718, n. (*r*); but see Todd v. Redford, 11 Mod. R. 264; Dix v. Brookes, 1 Stra. 61.
(*r*) Guy v. Livesey, Cro. Jac. 501, 502; Per Holt, C. J., Russell v. Corne, 3 Lord Raymond, 1031; S. C. 1 Salk. 119. (*s*) 3 Bla. Com. 139, 140.
(*t*) Hyde v. Scyssor, Cro. Jac. 538; Young v. Pridd, Cro. Car. 89.
(*u*) Smith v. Hixon, 2 Stra. 977; Dalby v. Dorthall, Cro. Car. 553.
(*x*) Newton v. Hatter, 2 Lord Raymond, 1208; Anon. v. Heylers, Cro. Car. 175.
(*y*) Guy v. Livesey, Cro. Jac. 501; Read v. Marshall, 8 Mod. 342.
(*z*) Talbot v. Bacon, 1 Lev. 3; ante, s. 278.
(*a*) Dengate v. Gardiner, 4 M. & W. 5;[b] Grove v. Hart, cited 4 B. & Ad. 520, 521; post, s. 287. (*b*) Dengate v. Gardiner, 4 M. & W. 5.[b]
(*c*) Saville v. Sweeny, 4 B. & Ad. 514;[a] Coleman v. Harcourt, 1 Lev. 140, cited, Russell v. Corne, 2 Lord Raymond, 1032. (*d*) Id.
(*e*) Saville v. Sweeny, 4 B. & Ad. 513.[a]

[a] Eng. Com. Law Reps. 24. [b] Reprinted at $2.50 per vol.

person or property, for which he might have sued alone during the coverture ;(*g*) hence, it follows from the preceding sections, that the right of suit for a tort of that description will not survive, unless there be special damage to the husband.

282. The restrictions which prevent a feme covert from suing alone are the same in actions founded on tort as in those ex contractu.(*h*) If she survive, the rule respecting her right of action for torts previous to her husband's death, is that, wherever she either might or must have joined with her husband during his lifetime, in such cases the right of suit survives to her ;(*i*) and consequently a right of action for injuries done to her person or property either before or during coverture will survive to her, and she may include in one action trespasses to her land, committed as well in the lifetime of her husband, as since his decease ;(*k*) but where a [*234] *life estate vested in the wife, by survivorship, it was held that she could not sue the assignee of her husband, who had become bankrupt for permissive waste, suffered by them before her husband's death.(*l*)

283. In quare impedit,(*m*) or trespass to land held in right of his wife,(*n*) and in case for obstructing a right of way to land leased to the wife dum sola, or for cutting down trees, the lops of which were reserved to her,(*o*) the husband may either sue alone, or jointly with his wife ; and in suing for an injury to the reversionary interest in lands demised to husband and wife, the latter need not join.(*p*) So, where the wife is the meritorious cause of action, or where she has a vested interest which is directly affected by defendant's tortious act ;(*q*) as, in an action, for the escape of a person committed for non-payment of money, found due to husband and wife by a Master in Chancery under an order of reference.(*r*)

284. With respect to personalty, the rule is that where the cause of action had its inception only before marriage, but was consummated afterwards, the wife may join or not at the husband's election ; as in trover, if [*235] the finding was prior, and the conversion subsequent to *marriage,(*s*) or case for the rescue of a distress during coverture, for a rent-charge due to the feme dum sola,(*t*) for the rescue is a tort to the husband, for which he may sue alone, but inasmuch as it arises out of a duty due to

(*g*) Vin. Ab. Bar. and Feme, (G.) ; Com. Dig. Bar. and Feme, (W.), (X) ; 1 Chitt. Plead. 6th ed. 75.

(*h*) Ante, ss. 99, 100 ; Boggett v. Frier, 11 East, 301 ; Clarke v. Davies, 7 Taunt. 72.[b] As to staying proceedings if wife sue in husband's name without indemnifying him, 2 Chitt. Arch. Pr. 7th ed. 996.

(*i*) Post, ss. 283. 287 ; Roll. Ab. Bar. & Feme, 349, (A.).

(*k*) Com. Dig. Bar. and Feme, (2 A.) ; Woodfall, L. & T. 4th ed. 578.

(*l*) Bacon v. Smith, 1 A. & E., N. S. 345.[c]

(*m*) Selw. N. P. 10th ed. 294 ; Co. Litt. 351, a.

(*n*) Com. Dig. Bar. and Feme, (X.) (V.) ; 1 Roper, Husband and Wife, 2nd ed. 215.

(*o*) Baker v. Brereman, Cro. Car. 418 ; Tregmiell v. Reeve, Id. 437. See Jeremy v. Lowgar, Cro. Eliz. 461. (*p*) Wallis v. Harrison, 5 M. & W. 142.[♦]

(*q*) Weller v. Baker, 2 Wils. 414, cited 4 B. & Ad. 518,[d] and Id. 523, per Littledale, J. ; Dunstan v. Burwell, 1 Wils. 224. (*r*) Huggins v. Durham, 2 Stra. 726.

(*s*) Blackborn v. Greaves, 2 Lev. 107 ; S. C. nom. Batmore v. Graves, Ventr. 260. See note to Nelthrop v. Anderson, 1 Salk. 114.

(*t*) Com. Dig. Bar. and Feme, (X.) ; Bac. Ab. Bar. & Feme, (K.).

[b]Eng. Com. Law Reps. 2. [c]Id. 41. [d]Id. 24. [♦]Reprinted at $2.50 per vol.

the wife, she may be joined at his election;(*u*) and in replevin for goods of the feme, taken whilst sole, she may join, if her title appear on the face of the record, or the husband may sue alone, because they became, by the marriage, his property.(*x*) And where goods were mortgaged to a feme sole by indenture, with a proviso, that if principal and interest should be paid at stated periods, the deed should be void, but no default in such payment was alleged in the declaration, so that the property in the goods did not absolutely pass; it was held that, after the marriage of the mortgagee, she might join with her husband in trover for an inventory of the goods, which had been annexed to the deed, for the right of action would have survived to her, and this is the true test; whereas the husband might also in this case have sued alone, because without the inventory he would never have been able to recover the goods.(*y*)

285. In real actions for recovery of the land of the wife, she must have joined with her husband, and she *may join with him in the demise in an ejectment even though the disseisin was subsequent to the marriage;(*z*) and likewise in detinue for charters of her inheritance, for they are incident to the estate.(*a*) So, the wife should perhaps join in an action on the case for waste upon a lease for years by husband and wife, the seisin being in right of the wife;(*b*) and for torts to the personal property of the wife, which had both their inception and consummation before marriage, she must be joined, as, in trover, if both the finding and conversion then occurred;(*c*) or in trespass for an injury done to the property of the wife dum sola.(*d*) [*236]

286. So, where the gist of the action is for an assault, battery, malicious indictment, or imprisonment,(*e*) or for any personal wrong or violence(*g*) done to the wife, *so that an action would survive to her, she ought to be joined,(*i*) but where the injury is not of that kind, and no action would survive to the wife, the only cause being a special damage to the husband, the wife cannot be joined, having no legal interest in that which forms the gist of the action.(*k*) In like manner husband and wife must sue jointly for slander of the wife, when the words are actionable in [*237]

(*u*) Adjudged, Fenner v. Plasket, Cro. Eliz. 459.

(*x*) Bourn v. Mattaire, Cas. temp. Hardw. 119; Serres v. Dodd, 2 Bos. & P. N. R. 407. As to detinue, ante, s. 279.

(*y*) Per Lord Denman, C. J., and Coleridge, J., Ayling v. Whicher, 6 A. & E. 259. 264.[e]

(*z*) Bac. Ab. Bar. and Feme, (K.); 1 Bulstr. 21; Plowden, 418; Woodfall, L. & T. 4th ed. 578; Chitt. Pleading, 6th ed. 74, and n. (*y*); Selw. N. P. 10th ed. 288; 1 Roper, Husband and Wife, 2nd ed. 185. 215; Vin. Ab. Bar. and Feme, (R.) pl. 15, (T.) pl. 4. By stat. 3 & 4 Will. 4, c. 27, s. 36, all real and mixed actions are abolished, except an action of dower, quare impedit, and ejectment.

(*a*) Com. Dig. Bar. and Feme, (V.); Bac. Ab. Bar. and Feme, (K.); Co. Litt. 6. a.; 1 Selw. N. P. 10th ed. 288.

(*b*) Com. Dig. Bar. and Feme, (V.); 1 Selw. N. P. 10th ed. 288; Chitt. Plead., 6th. ed. 74; but see Woodfall, L. & T. 578. Semble, the husband may sue alone.

(*c*) Com. Dig. Bar. and Feme, (V.): arg., Milner v. Milnes, 3 T. R. 629.

(*d*) Milner v. Milnes, 3 T. R. 627.

(*e*) 3 Bla. Com. 140; Hardy v. Robinson, 1 Keb. 440; Hyde v. Scyssor, Cro. Jac. 538; Guy v. Livesey, Id. 501; Higgins v. Butcher, Yelv. 89; Horton v. Byles, 1 Sid. 387; Com. Dig. Bar. and Feme, (V.). (*g*) Per Taunton, J., Saville v. Sweeny, 4 B. & Ad. 523.[f]

(*i*) Newton v. Hatter, 2 Lord Raymond, 1208; Russell v. Corne, Id. 1031.

(*k*) Per Taunton, J., 4 B. & Ad. 523;[g] Coleman v. Harcourt, 1 Lev. 140.

[e] Eng. Com. Law Reps. 33. [f] Id. 24. [g] Id. 24.

themselves, though special damage, as for the loss of the wife's wages, cannot in such an action be recovered:(*l*) and where the words are not actionable per se, but only by reason of special damage, the wife cannot join;(*m*) for words spoken of husband and wife there must necessarily be two actions, since the wife cannot join for slander of the husband;(*n*) and, where the wife has a right of action in autre droit, she must sue jointly with her husband.(*o*) We may add that in an action by the husband for criminal conversation, evidence of a valid marriage must be given, and not merely of a marriage de facto.(*p*)

[*238] *287. It is a well known rule that the demise declared upon in an ejectment must be consistent with the title of the lessor, that is to say, such a demise must be supposed to have been made as would, if actually made, have transferred the right of possession to the lessee.(*q*) In applying this rule to an ejectment by husband and wife, we must observe that at common law and irrespective of the stat. 32 H. 8, c. 28, a lease of land held *in jure uxoris* by the husband alone will be good, unless the wife by some act shew her dissent therefrom. By the statute just mentioned a husband seized of land in right of his wife is enabled to make a lease of the land so as to bind her absolutely, but if the directions contained in the statute are not duly observed, then the common law takes effect, and the wife will be at liberty to dissent from and avoid the lease.(*r*) It follows from this that the demise in an ejectment for lands of the wife may be laid in the name of the husband alone, or of the husband and wife jointly, unless the ejectment be brought for lands already held under a lease, either from the husband or from the husband and wife, in which case the demise in the ejectment ought to be conformable to that in the lease: it is therefore laid down, that if the husband seized in fee *jure uxoris* has made a lease jointly with his wife, and that lease being forfeited or expired, he brings ejectment and shews a demise to the plaintiff by himself only, the declara-

[*238 *a*] tion will be bad.(*s*) In connection with this part of our *subject, we may refer to a recent case not yet reported in which a rule Nisi for a new trial in an action of ejectment was obtained on the ground that the defendant was the wife of the lessor of the plaintiff, and the court after argument discharged the rule, observing that the effect of the consent rule was to put in issue nothing but the defendant's title, and that the technical objection raised to the maintenance of the action might be met by the technical answer, that John Doe, and not the husband, was the plaintiff on the record.(*t*)

(*l*) Per Lord Abinger, C. B., Dengate v. Gardiner, 4 M. & W. 6, 7.
(*m*) Grove v. Hart, cited 4 B. & Ad. 520, 521;[s] Saville v. Sweeny, 4 B. & Ad. 514;[s] Horton v. Byles, 1 Sid. 387.
(*n*) 1 Selw. N. P. 10th ed. 298; see Smith v. Cooker, Cro. Car. 512.
(*o*) Serres v. Dodd, 2 Bos. & P. N. R. 407; Com. Dig. Bar. and Feme (V.); Woodfall, L. & T. 4th ed. 578; 1 Roper, Husband and Wife, 2nd ed. 189; Thompson v. Pinchell, 11 Mod. 177.
(*p*) Catherwood v. Caslon, 13 M. & W. 261; see Harvey v. Watson, 8 Scott, N. R. 379.
(*q*) Adams on Ejectment, 4th ed., 166.
(*r*) Doe d. Collins v. Weller, 7 T. R. 478; see 2 Crabb, Real Prop. 285, et seq.
(*s*) Coote, L. & T. 576, Bac. Abr. Bar. and Feme (D. 3.)
(*t*) Doe d. Merrigan v. Daly, Q. B., Easter, T., May 11, 1846.

[s] Eng. Com. Law Reps. 24.

288. An infant has clearly a right of action for a tort to his person or property, though he must sue by guardian or prochein ami; and trespass has been held to lie by one joint testamentary guardian of an infant against the other for a forcible removal of the infant.(*u*) Prior to the recent stat. 7 & 8 Vict. c. 66, an action of ejectment could not have been sustained by an alien, for he is disqualified by the common law from holding land;(*v*) by the 3rd sect. of that Act, however, every person born of a British mother may hold real and personal estate; by sect. 4, alien friends may hold every species of personal property, except chattels real; and sect. 5, provides that every alien friend living in this country may hold lands for the purpose of residence or trade for any term not exceeding twenty-one years. By s. 6, moreover, an alien, who has become *naturalized in the manner pointed out by the statute, shall enjoy all such rights and capacities (subject to certain exceptions therein mentioned), as a natural born subject of the United Kingdom can enjoy or transmit. Previously to the passing of this Act, it had been held that trespass would not lie at suit of an alien artificer for breaking and entering his dwelling-house held under a lease, void by stat. 32 Hen. 8, c. 16, or under an illegal agreement for such a lease.(*x*) But an alien friend, though resident abroad, was held entitled to maintain all actions personal, as for assault and battery, libel, slander, and the like;(*y*) an alien enemy cannot however (subject to the exceptions previously noticed(*z*)) sue in our courts.(*a*) [*238 *b*]

289. Although, as before stated, a person attainted of felony cannot maintain an action since he is, during the period of attainder, civiliter mortuus; yet ejectment will lie for freehold lands on the demise of an attainted felon, since the estate does not vest in the Crown until office found;(*b*) and the effect of a pardon is to restore competency.(*c*)

(*u*) Gilbert v. Schwenck, 14 M. & W. 488;♦ see 12 Car. 2, c. 24, s. 8.
(*v*) Co. Litt. 129, b; Pisani v. Lawson, 6 Bing. N. C. 95;[h] see, however, Doe d. Miller v. Rogers, 1 Car. & K. 390.[i]
(*x*) Lapierre v. M'Intosh, 9 A. & E. 857;[k] 2 Bla. Com. 16th ed. 293, n. (6). See Wootton v. Steffenoni, 12 M. & W. 129.♦
(*y*) Pisani v. Lawson, 6 Bing. N. C. 90. 95;[l] Tirlot v. Morris, 1 Bulstr. 134; Com. Dig. Alien (C. 5).
(*z*) Ante, s. 113. See Alciator v. Smith, 3 Camp. 245.
(*a*) Com. Dig. Alien (C. 5).
(*b*) Doe d. Griffith v. Pritchard, 5 B. & Ad. 765.[m] Ante, s. 114.
(*c*) Doe d. Evans v. Evans, 5 B. & C. 584;[n] see the argument in Bullock v. Dodds, 2 B. & Ald. 268, et seq.

[h]Eng. Com. Law Reps. 37. [i]Id. 47. [k]Id. 36. [l]Id. 37. [m]Id. 27. [n]Id. 12.
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[*239] *CHAPTER IV.

1. BANKRUPTCY AND INSOLVENCY, ss. 290–293.
2. EXECUTORS AND ADMINISTRATORS, ss. 294–297.

1.—BANKRUPTCY AND INSOLVENCY.

Right of the Assignees to sue, s. 290. Right of the Bankrupt to sue, ss. 291, 292. Insolvency, s. 293.

290. THE assignees of a bankrupt are the parties to sue jointly(a) in tort for the recovery of any portion of the property vested in him before bankruptcy,(b) whether real or personal, and whether the same were fraudulently alienated by the bankrupt in contravention of the provisions of the bankrupt act, or tortiously taken by the party in possession;(c) and for all injuries committed thereto by which the amount of the fund belonging to the creditors is lessened; as, for the injury resulting to an under-tenant (the bankrupt) from the breach of an implied duty on the part of his immediate lessor, to indemnify him against the non-performance of the covenants entered into with the superior landlord.(d) It should be observed, however, that [*240] if the assignees have *once affirmed the acts of a party who has disposed of or converted goods belonging to the bankrupt, and have, by so doing, ratified the contract, and treated such party as their agent, they cannot afterwards repudiate the contract, and treat him as a wrongdoer; nor can they affirm his acts in part, and avoid them as to the rest;(e) but the assignees may revoke an authority to sell goods given by the bankrupt to his agent, for they stand in the place of the bankrupt, by whom the authority so given was revocable.(g)

291. Where, however, the injury complained of is to the person, feelings, or reputation of the bankrupt, and not to his personal property, the right to sue does not pass to the assignees, but remains vested in, and must be exercised, if at all, by the bankrupt.(h) He, therefore, and not his assignees, must recover damages for an assault,(i) or slander;(k) and the assignees cannot sue for a libel on the bankrupt, even though the injury occasioned thereby to his reputation may have been the sole cause of bankruptcy.(l) So, the loss of service resulting from the seduction of the bankrupt's daughter is only a personal inconvenience, which cannot be consider-

(a) Bloxam v. Hubbard, 5 East, 407; Snellgrove v. Hunt, 1 Chitt. R. 71; Flather, Arch. Bankruptcy, 398.
(b) Smith v. Coffin, 2 H. Bla. 444. 462; Michell v. Hughes, 6 Bing. 689;[o] Flather, Arch. Bankruptcy, 393.
(c) Infra, n. (e). (d) Hancock v. Caffyn, 8 Bing. 358.[p]
(e) Brewer v. Sparrow, 7 B. & C. 310. 312, 313;[q] Smith v. Hodson, 4 T. R. 211; King v. Leith, 2 T. R. 141; Gye v. Hitchcock, 4 A. & E. 84;[r] Butler v. Carver, 2 Stark. 433.[s]
(g) Raleigh v. Atkinson, 6 M. & W. 670.[♦]
(h) Per Tindal, C. J., and Park, J., Hancock v. Caffyn, 8 Bing. 366. 368;[t] Howard v. Crowther, 8 M. & W. 601.[♦]
(i) Per Lord Abinger, C. B., Howard v. Crowther, 8 M. & W. 603.[♦]
(k) Benson v. Flower, Sir W. Jones, 215.
(l) Per Alderson, B., 8 M. & W. 604.[♦]

[o]Eng. Com. Law Reps. 19. [p]Id. 21. [q]Id. 14. [r]Id. 31. [s]Id. 3. [t]Id. 21.
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ed as prejudicial to the estate; and, for which, therefore, an *action must be brought in the bankrupt's name.(m) "There is no doubt," [*241] as observed by the Court of Exchequer Chamber,(n) "that a right of action for an injury to the body or feelings of a trader, arising from a tort, independent of contract, does not pass to his assignees ex. gr. for an assault and battery, or for slander, or for the seduction of a child or servant, and the same may be said of some personal injuries arising out of breaches of contracts, as contracts to cure or to marry, and if in the cases last supposed a consequential damage to the personal estate follows from the injury to the person, that may be so dependent upon and inseparable from the personal injury which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the assignees of a bankrupt."

291 *a*. "As to the object of the law," remarked Lord Denman in a recent case, "is manifestly to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has in furtherance of this object been construed largely, so as to pass not only what in strictness may be called the property and debts of the bankrupt, but also those rights of action to which he was entitled for the purpose of recovering in specie, real or personal property, or damages, in respect of that which has been unlawfully diminished in value, withheld or taken from him, but causes of action not falling within this description but arising out of a wrong personal to the bankrupt, for *which he would be enti- [*242] tled to remedy, whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit of the enactments, even in cases where injuries of this kind may have been accompanied or followed by loss of property, and to this class we think the action of trespass qu. cl. fr., and that of trespass to the goods of the bankrupt must be considered to belong. These rights of action are given in respect of the immediate and present violation of the possession of the bankrupt independently of his rights of property—they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred, and even where such an incident has accompanied or followed a wrong of this description, the primary personal injury to the bankrupt being the principal and essential cause of action still remains in him, and does not vest in the assignee, either as his property or his debts."(o) In accordance with the principle thus laid down, it has been held that trespass for seizing and taking the bankrupt's goods under a false and unfounded claim of a debt, whereby the bankrupt was annoyed and prejudiced in his business, and believed by his customers to be insolvent, in consequence whereof certain lodgers left his house, could not be maintained by his assignees.(p) In this case the plea

(m) Howard v. Crowther, 8 M. & W. 601.♦

(n) Drake v. Beckham, 11 M. & W. 319,♦ reversing the judgment in Beckham v. Drake, 8 M. & W. 846,♦ S. C., 9 M. & W. 79.♦

(o) Judgment, Rogers v. Spence, 13 M. & W. 580, 591,♦ affirming Spence v. Rogers, 11 Id. 191, which recognises Clark v. Calvert, 8 Taunt. 742. See Topham v. Dent, 6 Bing. 515.▪ (p) Brewer v. Dew, 11 M. & W. 625.♦

▪Eng. Com. Law Reps. 19. ♦Reprinted at $2.50 per vol.

[*243] of *the plaintiff's bankruptcy was pleaded "as to the seizing and taking the goods and chattels in the declaration mentioned," and it was observed that although such a plea might have been good if limited to the *value* of the goods, yet that the jury might as the record stood give damages beyond the value of the goods, in respect of the *manner* of the seizure, and that the right to sue for such damages would not pass to the assignees.(q)

292. As to chattels acquired subsequently to the bankruptcy, the bankrupt whilst uncertificated has in these a defeasible property, which none but the assignees can defeat ;(r) and, subject to their interference, he or his personal representative may maintain trover for them against a stranger :(s) but an uncertificated bankrupt is not entitled to retain property against his assignees, even though left in his possession, under an agreement, for a valuable consideration paid to them by a third party ;(t) nor can he maintain trespass for seizing his effects, against one who subsequently obtained from the assignees a surrender of their interest in the effects seized, this being, in fact, a ratification of the seizue.(u) Where a party had taken possession of the goods of an intestate after his death, it was held, that he could not set up as a defence to an action of trover by the administrator, that the intestate [*244] had been first insolvent, and *then bankrupt, and had not paid 15*s.* in the pound under the fiat ; and that, therefore, the property in the goods vested absolutely in the assignees, the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them.(x) In such a case as the above it is clear that the bankrupt, whilst uncertificated, contracts and acquires property on behalf of, and for the benefit of his assignees, and he may, subject to their interference, sue for property which he has thus acquired ; and it will be no plea that the property is vested in the assignees, unless it contains an averment that they have interfered, and desired the defendant to give up the property to them, and not to the bankrupt.(y)

292 *a*. It is moreover a general rule, that where goods are sold by the bankrupt, whilst uncertificated, the assignees may either affirm the sale as having been effected by the bankrupt as their agent, and sue in assumpsit for the price, or they may repudiate the sale and bring trover for the goods. Where, for instance, it appeared that after the bankruptcy the bankrupt delivered goods to the defendants, as they alleged, to meet an accommodation bill which they were about to give the bankrupt, and the goods were accompanied by an invoice, which stated them to be *bought* by the defendants of the bankrupt, it was held, under these circumstances that the assignees might waive the tort and bring assumpsit for goods sold and delivered.(z)

(q) See per Lord Abinger, C. B. 11 M. & W. 629.♦
(r) Per Heath, J., Fowler v. Down, 1 Bos. & Pul. 48, recognised per Grose, J., Webb v. Fox, 7 T. R. 398.
(s) Fowler v. Down, 1 Bos. & Pul. 44 ; Webb v. Fox, 7 T. R. 391 ; Fyson v. Chambers, 9 M. & W. 460. (t) Nias v. Adamson, 3 B. & Ald. 225.[x]
(u) Hull v. Pickersgill, 1 Brod. & Bing. 282.[x]
(x) Fyson v. Chambers, 9 M. & W. 460.♦
(y) Herbert v. Sayer, 5 Q. B. 982, ante,[a] s. 115, a.
(z) Russell v. Bell, 10 M. & W. 340.♦

[x]Eng. Com. Law Repa. 5. [a]Id. 48.

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292 *b*. Although the assignees of a bankrupt have, as *already stated, a right of action ex delicto, for any injury done to the goods, [*244 *a*] to which they have become entitled as assignees, and likewise succeed to those rights of action which were vested in the bankrupt, by relation to the act of bankruptcy,(*a*) yet it must be borne in mind that these are two different descriptions of interest; thus, in the latter case, a release by or accord and satisfaction to the bankrupt, would be a good bar, but not in the other. It is therefore necessary that the title of the assignees should be correctly described, for if they sue in trover, and the declaration alleges that the *property* in the goods was vested in them, they will fail unless proof be given of a conversion after bankruptcy: it will not be sufficient to shew that an injury has been done to the goods, but to support the declaration they will be bound to shew that it was done to *their* goods.(*b*)

293. The right of an insolvent to sue in tort seems by analogy similar to that of a bankrupt, and does not require any separate notice. It should be observed, however, that the assignee of an insolvent debtor, on his acceptance of the appointment, has vested in him all the estate and rights of the insolvent, from the date of the vesting order, and may therefore recover, in an action of trover, wherein he alleges that he possessed as assignee before the period of the conversion, though the conversion took place in the time of the *provisional assignee.(*c*) Moreover the interest of an insolvent in premises held by him either for a term or from year [*244 *b*] to year, under an agreement for a lease, has been held to pass by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant, with respect to the same, notwithstanding no act has been done by such provisional assignee to shew his acceptance or refusal of the lease.(*d*)

2.—Executors and Administrators.

Where Personal Representatives may sue for a Tort to the Testator or Intestate, and Limitation of the Rule, ss. 294, 295. For Injuries to the Real Estate of the deceased, s. 296. Rule as to the Joinder of Personal Representatives—How they should sue, s. 297.

294. By stat. 4 Edw. 3, c. 7, reciting that, in times past, executors had not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away(*e*) in their lifetime, it is enacted that the executors in such cases shall have an action against the trespassers, in like manner as they whose executors they are should have had if they

(*a*) See Turquand v. Hawtrey, 9 M. & W. 727; Rouch v. The Great Western Railway Company, 1 Q. B. 51;[b] ante s. 115.

(*b*) Edwards v. Hooper, 11 M. & W. 363; Alsager v. Close, 10 M. & W. 576.

(*c*) Yorke v. Browne, 10 M. & W. 78.

(*d*) Doe d. Palmer v. Andrews, 4 Bing. 348.[c]

(*e*) This statute has always been expounded largely, being a remedial law. Williams v. Breedon, 1 B. & P. 329; Emerson v. Emerson, 1 Ventr. 187. See the note, 1 Wms. Saund. 216 a, 217.

[b] Eng. Com. Law Reps. 41. [c] Id. 13.

were living. An administrator is within the equity of this statute;(*f*) [*244 *c*] *and by stat. 25 Edw. 3, st. 5, c. 5, the like remedy is extended to the executors of executors.

294 *a*. Under the first-mentioned statute, it has been held, that executors may maintain an ejectment, a quare impedit, and an action of trover or replevin, the conversion or taking having been in the testator's lifetime.(*g*) So, case lies by an executor against a sheriff, for a false return to a fi. fa., made in the lifetime of the testator,(*h*) or for an escape on final process.(*i*)

294 *b*. It is moreover important to observe that an executor or administrator has the property of the goods of his testator or intestate vested in him before his actual possession, for the interest of an executor in the estate of the deceased is derived exclusively from the will, and such estate consequently vests in the executor from the moment of the testator's death, and the letters of administration relate back to the time of the death of the intestate, and not merely to the time of granting them, and therefore an executor or administrator may maintain trespass or trover for goods of [*244 *d*] the intestate *taken between the death and the grant of probate, or of letters of administration.(*k*) "In the case of an administration," it was recently observed, "a man cannot sue out a writ as administrator until he has obtained his letters of administration, although when he has obtained them all tortious acts done to the deceased's property relate back to the time of his death, so as to enable the administrator to sue for them."(*l*) So the demise in ejectment may be laid by an executor before probate granted, and by an administrator before administration granted.(*m*) It has likewise recently been decided that a demise laid by two out of three co-executors is good, for each executor takes the whole estate, although all the co-executors are, in law, but one person, and each therefore by his demise passes the entire interest in the land demised.(*n*)

295. Prior to the recent stat. 9 & 10 Vict. c. 93, an action was not maintainable against a person, who by his wrongful act occasioned the death of another, but by s. 1 of that act, it is enacted that "whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled [*244 *e*] the party injured to maintain an action, and recover *damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to

(*f*) Smith v. Colgay, Cro. Eliz. 384; and see 31 Edw. 3, st. 1, c. 11.

(*g*) 1 Williams on Executors, 3d ed. 622. 626. 697; Bro. Ab. Executors, 45; Doe d. Shore v. Porter, 3 T. R. 13; Rutland v. Rutland, Cro. Eliz. 377; Drake's case, and Russel v. Pratt, cited, Cro. Eliz. 377; Com. Dig. Administration (B. 13.) See, as to the construction of the statute, per Lord Ellenborough, C. J., Wilson v. Knubley, 7 East, 134, 135; post, s. 297.

(*h*) Williams v. Grey, 1 Lord Raymond, 40; Com. Dig. Administration (B. 13).

(*i*) Per Holt, C. J., Berwick v. Andrews, 2 Lord Raymond, 973. See Palgrave v. Windham, 1 Stra. 212; Le Mason v. Dixon, Sir W. Jones, 173.

(*k*) Tharpe v. Stallwood, 6 Scott, N. R. 715, recognised Foster v. Bates, 12 M. & W. 226; Com. Dig. Administration (B. 9), (B. 10).

(*l*) Per Parke, B., Yorston v. Feathers, 15 L. J., N. S., Ex. 31.

(*m*) Doe d. Bendall v. Summerset, 2 W. Bla. 694; Patten v. Patten, 1 Al. & Nap. 493, cited Arg. 6 Scott, N. R. 718. As to evidence of title, see Doe d. Woodhouse v. Powell, 15 L. J., N. S., Q. B. 189.

(*n*) Doe d. Stace v. Wheeler, MS. Excheq. Trin. T., June 5, 1846.

felony." By sect. 2, it is further enacted, "that every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct." By sect. 3, the action for damages must be brought within twelve calendar months after the death of such deceased person. It will be observed that the operation of this statute is confined to cases in which death ensues from the wrongful act, neglect or default of another, and therefore for a tort to the person which does not occasion death, as for an assault, or for an injury to the feelings or reputation of the testator, as for libel or slander, or the seduction of his daughter, the executors or administrators cannot recover damages, for they represent not so much the person, as the personal estate of the testator or intestate, of which they are in law his assignees.(*o*) It has been observed indeed that *the maxim *Actio personalis moritur cum personâ?* is not applied [*244*f*] in the old authorities to causes of action ex contractu, "but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law."(*p*)

296. Previously to the stat. 3 & 4 Will. 4, c. 42, no remedy was provided for injuries to the real estate of any person deceased, committed in his lifetime,(*q*) but the second section of that statute enacts that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages when recovered shall be part of the personal estate of such person. If an action be brought by a termor, upon the stat. 7 & 8 Geo. 4, c. 31, for an injury done to his house, within three calendar months from the offence committed, and that action abates by the death of the termor, after the three months have expired, his executor cannot, it seems, bring a fresh action;(*r*) and it is a matter of doubt, whether an executor of a termor *can, in any case, bring an action upon that statute, for an [*245] injury to the premises under lease, sustained in the lifetime of his testator.(*e*)

(*o*) 3 Bla. Com. 302, and n. (9), 16th ed.; Com. Dig. Administration, (B. 13); Wheatley v. Lane, 1 Wms. Saund. 216 (1).

(*p*) Per Lord Abinger, C. B., Raymond v. Fitch, 2 Cr. M. & R. 597, recognised Ricketts v. Weaver, 12 M. & W. 723.

(*q*) 1 Wms. Saund. 217, n.

(*r*) Adam v. Inhabitants of Bristol, 2 A. & E. 389.[d]

(*e*) Judgment, Id. 402; 1 Williams on Executors, 3rd ed. 630; 2 Chitt. Arch. Pr. 7th ed. 1180.

[d]Eng. Com. Law Reps. 29.

297. Where a personal representative sues in right of the deceased for a tortious act committed in his lifetime, he must declare in that character; but in an action for the recovery of goods, or for taking away goods, the right to which vested in him by virtue of his representative character, and which right draws after it a constructive possession, an executor or administrator may either sue as such or in his individual capacity,(*g*) that is, he may lay the possession either as that of the deceased, or as his own; and this holds whether he was ever actually possessed or not.(*h*) Both executors and administrators ought to join in suing for a tort, committed in the lifetime of the testator or intestate, or for taking away his effects, subsequently to his death, for the interest is joint; and this holds, though one only possessed himself of such effects, for his act in so doing is, in law, the act of all.(*i*)

[*246] *PART IV.

DEFENDANTS IN ACTIONS EX DELICTO.

CHAPTER I.

GENERAL RULES.

Who should be sued for a Tort, ss. 298, 299. Joinder of Parties liable for a Tort, ss. 300, 301. In the Case of a Partnership or a Corporation, ss. 302, 303. Where the Action is founded on a Contract or concerns Real Property, s. 304. Assignment of Liability, s. 305.

298. The rule in actions ex delicto is, that the party committing the tortious act, or asserting the adverse right or title, must be made defendant, as the wrongful occupant of land in ejectment,(*a*) the party guilty of a conversion in trover, or of a nuisance in an action on the case; and hence no difficulty can in general occur in determining the proper party to be sued for a tort, the consideration being, whether such party is legally liable or not: in reference to which it must be observed, that in many instances the person responsible in law is not the immediate cause of the injury sustained, as, where it is

(*g*) Per Buller, J., Gallant v. Bouteflower, 3 Dougl. 35, 36; Bollard v. Spencer, 7 T. R. 358; Hollis v. Smith, 10 East, 292; Bonafous v. Walker, 2 T. R. 126; 1 Williams on Executors, 3rd ed. 695, 696; 1 Wms. Saund. 112, n. (1); ante, s. 249.

(*h*) Adams v. Cheverel, Cro. Jac. 113; Com. Dig. Administration, (B. 10); see Bac. Ab. Executors and Administrators, (O.). See the forms of declaring on a conversion in the lifetime of deceased, and subsequently to his death, Chitt. jun. Pl. 666.

(*i*) Com. Dig. Administration, B. (12); Bac. Ab. Executors and Administrators, (D. 1. 3); Per Parke, B., 1 Cr. M. & R. 174; 2 Williams on Executors, 3rd ed. 1466.

(*a*) Goodright v. Govett, 7 T. R. 327; Fenn v. Wood, 1 B. & P. 573.

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occasioned by his agent, or by one acting under his control,(*b*) or by a mischievous animal, of *which he is the owner, or where it results from his negligence,(*c*) provided that the plaintiff did not by his own [*247] negligence or improper conduct, or by his own imprudence and want of caution, substantially contribute to the occurrence of the injury of which he complains(*d*). So, the tort may result from the defendant's misrepresentations, in which case, it is a principle of law, that where there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.(*e*) So that where A. sells a gun with a fraudulent warranty to B. for the use of C., to whom such warranty is either directly or indirectly communicated, and who is injured by the bursting of the gun; A. is liable to B. on the warranty by reason of the privity of contract,(*g*) and to C. for the injury resulting from the false representation.(*h*)

*299. This distinction must, however, be observed, that if a man purchase goods of a tradesman without in any way relying upon the [*248] skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but if the tradesman be informed at the time the order is given of the purpose for which the article is wanted, the buyer relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required;(*i*) and where the warranty is one which the law implies, it will not be excluded by the fact of there being a written contract between the parties.(*k*)

300. The general rule is, that, in an action of tort, all persons concerned in the wrong are liable to be charged as principals;(*l*) but instead of bringing his action against all jointly, the plaintiff may sue one or more at his election without exposing himself to a plea in abatement for non-joinder; and this is an important distinction between actions founded in tort and on contract.(*m*)

(*b*) Wheatley v. Patrick, 2 M. & W. 650.*

(*c*) Lynch v. Nurdin, 1 A. & E., N. S. 29,[a] and cases there cited.

(*d*) 1 A. & E. 36;[b] recognizing Butterfield v. Forrester, 11 East, 60; Sills v. Brown, 9 C. & P. 601;[c] Raisin v. Mitchell, Id. 613, 617, n. (*a*); Woolf v. Beard, 8 C. P. 373;[d] Hawkins v. Cooper, Id. 473. Where the injury is produced by an unavoidable accident, no action will lie, Wakeman v. Robinson, 1 Bing. 213.*

(*e*) Per Parke, B., delivering the judgment of the Court, Langridge v. Levy, 2 M. & W. 532,* affirmed in error, 4 M. & W. 337, 338, and cases there cited; Pilmore v. Hood, 5 Bing. N. C. 97;[e] Per Buller, J., Pasley v. Freeman, 3 T. R. 56; Shrewsbury v. Blount, 2 Scott, N. R. 588; Pontifex v. Bignold, 3 Scott, N. R. 390.

(*g*) See Brown v. Edgington, 2 Scott, N. R. 496; Jones v. Bright, 5 Bing. 533;[g] Shepherd v. Pybus, 11 Law Journ., N. S., C. P. 101; S. C. 4 Scott, N. R. 434.

(*h*) Langridge v. Levy, 2 M. & W. 519, 529. 532.*

(*i*) Per Tindal, C. J., Brown v. Edginton, 2 Scott, N. R. 504.

(*k*) Shepherd v. Pybus, 11 Law Journ., N. S., C. P. 101; S. C. 4 Scott, V. R. 434.

(*l*) Per Tindal, C. J., Cranch v. White, 1 Bing. N. C. 418.[h]

(*m*) Per Lord Kenyon, C. J., Bristow v. James, 7 T. R. 259; Sutton v. Clarke, 6 Taunt. 29;[i] 1 Wms. Saund. 291 d.; Mitchell v. Tarbutt, 5 T. R. 651. As to staying proceedings after recovery, against one of several tort-feasors, in an action against the others, see 2 Chitt. Arch. Pr. 7th ed. 993.

[a] Eng. Com. Law Reps. 41. [b] Id. 28. [c] Id. 38. [d] Id. 34. [e] Id. 8. [f] Id. 35. [g] Id. 15. [h] Id. 27. [i] Id. 1. *Reprinted at $250 per vol.

301. Whether several can in legal contemplation be concerned in a tortious act depends on the nature of the particular act: thus, case lies against two persons for negligently driving a carriage jointly hired by them, [*249] and of which they were in the joint possession at the *time of the accident occurring;(n) and if two falsely and maliciously procure another to be indicted, an action on the case will lie against both, although in strictness, the procurement of one is not the procurement of the other,(o) or one only might be sued.(p) In like manner, several may be sued in trover, if there be a joint conversion,(q) and in trespass, provided the trespasses complained of are not of several and distinct kinds, for an action could not be brought against one for an assault and battery, and against a co-defendant for the asportavit.(r) So, if several are guilty of the same slander, there must be separate actions;(s) but he who composes and he who publishes a libel, or causes another to publish it, may be sued jointly, for they conduce jointly to the injury.(t)

302. In trespass the rule is, that all persons who aid or counsel, direct or join, are joint-trespassers.(u) However a person's subsequent assent to a trespass will not be sufficient to render the assenting party a co-trespasser unless the trespass was done to his use or for his benefit.(x) And although [*250] generally one partner cannot *involve another in the same mischief,(y) yet there may be exceptions to this rule, as in the case of a trespass, if it be in the nature of a taking, which is available to the partnership, more especially, if the other partners afterwards agree and consent to the act.(z) And partners cannot by private agreement between themselves vary their liability as to third parties. So that where A. and B. were partners in the business of public carriers, and by agreement between them, A. provided horses and drivers for certain stages, and B. for the remainder; it was held, that B. was nevertheless liable for the misconduct of a driver hired and paid by A. alone.(a)

303. We may observe here, that a corporation is liable in its corporate capacity for the tortious act of its agent, though not appointed by seal, if such act be an ordinary service within the scope of his authority, such as a distress(b) professedly made under a statute for a debt due to the corporation; and a jury may infer the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure,(c)

(n) Davey v. Chamberlain, 4 Esp. 229.
(o) 2 Wms. Saund. 117 a., n. (2); Pencavin v. Trapping, Latch, 262.
(p) Mills v. Mills, Cro. Car. 239.
(q) Nicoll v. Glennie, 1 M. & S. 588.
(r) 2 Wms. Saund. 117 a.; Bac. Ab. Actions in General, (C).
(s) Chamberlain v. White, Cro. Jac. 647; 2 Wms. Saund. 117 a., b:
(t) Bac. Ab. Libel, (B. 1), (B. 2). See Martin v. Kennedy, 2 B. & P. 69; Watts v. Fraser, 7 C. & P. 369.
(u) Per Tyndal, C. J., Petrie v. Lamont, 1 Car. & Marsh, 96.[k]
(x) Wilson v. Barker, 4 B. & Ad. 614, 616.[l]
(y) Per Tyndal C. J., Petrie v. Lamont, 1 Car. & Marsh. 93.[m]
(z) Id. (a) Weyland v. Elkins, Holt, N. P. C. 227.[n]
(b) Carey v. Matthews, cited, 1 Salk. 191; Manby v. Long, 3 Lev. 107. But replevin does not lie against a corporation aggregate, which can only distrain by bailiff, 1 Kyd. Corporations, 205.
(c) Smith v. The Birmingham Gas Company, 1 A. & E. 526; Yarborough v. The Bank of England, 16 East, 6.

[k]Eng. Com. Law Rep. 41. [l]Id. 24. [m]Id. 41. [n]Id. 3. [o]Id. 28.

and trover, case,(*d*) or trespass will lie accordingly.(*e*) But if the service be not an ordinary one, *the agent must shew that he was authorized by deed.(*g*) And an action does not lie against individuals [*251] for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff, at least not without proof of malice.(*h*) Ejectment seems clearly maintainable against a corporation.(*i*)

304. The general rule being, as stated, that in actions ex delicto the non-joinder of a co-defendant cannot be pleaded in abatement it still remains, after several conflicting decisions,(*j*) a matter of doubt whether such a plea would be good to a declaration framed in case, but founded on contract, and whether judgment could, as in actions founded on tort, be given for some defendants and against others ;(*k*) but, as against common carriers, it is now enacted, that non-joinder of a co-proprietor shall be no ground for pleading in abatement, even though the declaration be framed in assumpsit.(*l*) A distinction, moreover, is laid down between personal actions of tort and such as concern real property; and in actions of the latter description, it is said, that joint-tenants *and tenants in common must be sued jointly, subject to a plea in abatement.(*m*) [*252]

305. There cannot, strictly speaking, be any assignment of liability for a tort, except by the death of the wrong-doer, in which case the remedy, if any, survives against his personal representatives.(*n*) But if a man has a cause of action against two, he may sue which he pleases ; as, if A. takes the goods of C., and B. takes them from A., C. shall have his action against A. or B. at his election.(*o*)

(*d*) Ib.; Mayor of Lyme v. Bealey, 1 Bing. N. C. 222.[p]

(*e*) Per Lord Ellenborough, C. J., 16 East, 7, opposed to the dictum of Lawrence, J., 8 East, 230. See the authorities collected, Id. 229, n. (*a*). It is now decided that trespass lies, Mound v. The Monmouthshire Canal Company, 11 Law Journ., N. S., C. P. 317.

(*g*) Horn v. Ivy, 1 Ventr. 47, recognized 1 A. & E. 530.[q]

(*h*) Harman v. Tappenden, 1 East 555.

(*i*) 1 Kyd. Corporations, 187, arg., Doe d. Parr v. Roe, 1 A. & E., N. S. 703. 705.[r]

(*j*) That it cannot be so pleaded, Govett v. Radnidge, 3 East, 62; contra, Powell v. Layton, 2 Bos. & P., N. R. 365; Max v. Roberts, Id. 454; S. C. 12 East, 89; Weall v. King, 12 East 452; and see the cases cited, per Littledale, arg., Bretherton v. Wood, 3 B. &. B. 58; Pozzi v. Shipton, 8 A. & E. 963.[t]

(*k*) See 1 Selw. N. P. 10th ed. 410, 411.

(*l*) 11 Geo. 4 & 1 Will. 4, c. 68, s. 5.

(*m*) Per Lord Kenyon, C. J., Mitchell v. Tarbutt, 5 T. R. 651; Bro. Abr. Joint-tenancy, pl. 12, cited, Id. 651; Com. Dig. Abatement, (F. 6.); 1 Wms. Saund. 291 e.

(*n*) Post, chap. iv. pt. 2. (*o*) Bac. Ab. Actions in General, (B.).

[p]Eng. Com. Law Reps. 27. [q]Id. 28. [r]Id. 41. [s]Id. 7. [t]Id. 35.

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*CHAPTER II.

1. LANDLORD AND TENANT, ss. 306—313.
2. PRINCIPAL AND AGENT—MASTER AND SERVANT, ss. 314—330.

1.—Landlord and Tenant.

Who should be sued for a Nuisance erected on the Land, ss. 306—308. For an Injury resulting from the Non-repair of Fences or of a House, s. 309. Joinder of Parties, Joint-Tenants, Coparceners, Tenants in Common, ss. 310, 311. Who Liable for a Nuisance after an assignment of the Reversion, s. 312. Liability of the Tenant for Waste, &c., s. 313.

306. Where the owner of land erects on it a nuisance, and subsequently to such erection, demises the land for a term, the lessor will be liable for the erection, and either lessor or lessee for the continuance of the nuisance at suit of the party injured thereby, the demise operating as an affirmance of the nuisance.(*a*) And though the plaintiff, having recovered in one action for the erection of the nuisance, cannot have another action for the same erection, yet he may maintain a new action for continuing the nuisance.(*b*)

307. Where a person lets premises with a nuisance upon them, and subsequently receives rent, he is liable *for the continuance of the [*254] nuisance.(*c*) But a landlord is not liable in respect of a nuisance erected by the tenant during the term, unless the natural consequence of the regular use of the premises is that they will become a nuisance unless properly attended to, in which case the landlord will be liable, if they afterwards become a nuisance by such regular use; and he ought in such a case either to stipulate with his tenants that they will do that which is necessary to prevent the premises from becoming a nuisance, or to reserve to himself the power of entering for the purpose.(*d*)

308. Where a nuisance was erected by the defendants on land belonging to a corporation of which the defendants were members, it was held, that they were liable for its continuance, although they had no right to enter on the land for the purpose of removing it, the apparent hardship being a consequence of their own original wrong;(*e*) and in the case of the continuance of a nuisance, every occupier after the erection is equally subject to an action for the nuisance.(*g*)

309. An action on the case for injury resulting from the non-repair of fences, can only be maintained against the occupier, and not against the owner of the fee who is not in possession; for it is notoriously the duty of the actual occupier to repair.(*h*) So, the tenant of a house *is prima [*255] facie bound to repair, and therefore liable; but if the owner is to

(*a*) Rosewell v. Prior, 2 Salk. 460, recognized in Cheetham v. Hampson, 4 T. R. 320; Brent v. Haddon, Cro. Jac. 555; Rippon v. Bowles, Id. 373.

(*b*) Shadwell v. Hutchinson, 2 B. & Ad. 97;[w] Holmes v. Wilson, 10 A. & E. 503;[x] Johnson v. Long, 1 Lord Raym. 370.

(*c*) Supra, n. (*a*); Woodfall, L. &. T. 4th ed. 671.

(*d*) Woodfall, L. & T. 4th ed. 671, 672. (*e*) Thompson v. Gibson, 7 M. & W. 456.

(*g*) Brent v. Haddon, Cro. Jac. 555. See Salmon v. Bensley, Ry. & Mo. 189.

(*h*) Cheetham v. Hampson, 4 T. R. 318; Reg. v. Bucknall, 2 Lord Raym. 804; Rider v. Smith, 3 T. R. 766; Russell v. Shenton, 11 Law Journ., N. S., Q. B. 289.

[w]Eng. Com. Law Reps. 22. [x]Id. 37.

repair, the action must be brought against him and not against the tenant.(*i*) So, case lies against a landlord of a house demised by lease, who employs workmen to repair, (although not bound by covenant so to do,) for a nuisance in the house occasioned by the negligence of his workmen;(*k*) the landlord being liable on the ground of his personal interference with his own property.(*l*)

310. Joint-tenants and tenants in common should, it is laid down, be sued jointly in trespass, trover, or case, for anything respecting the land held in common.(*m*) In the case of an avowry the rule is, that one who is not sole seised or has not sole title to the entire rent, cannot avow alone;(*n*) and therefore joint-tenants and co-parceners should join in an avowry or cognizance for rent,(*o*) or for taking cattle damage feasant,(*p*) or one joint-tenant should avow in his own right, and as bailiff to the other.(*q*) So, an avowry by one of several co-heirs in gavelkind, with a cognizance as bailiff for the other co-heirs, is sufficient without averring an authority from them to distrain.(*r*)

*311. Tenants in common must sever in an avowry for rent:(*s*) but tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant without making himself bailiff or servant to his companion; for if one were to distrain without the other, as there could not be a double satisfaction for the same injury, the other would have no remedy; and as to any supposed hardship in one denying his consent to the other avowing as bailiff to him, if he dislikes his situation, he may put an end to the tenancy by making partition.(*t*) [*256]

312. If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion, he makes himself liable for the nuisance.(*u*) But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; though in such a case, if there were only a tenancy from year to year, or any short period,(*x*) and the landlord chose to renew the tenancy after the tenants had erected the nuisance, that would make the landlord liable, for he is not to let the land with the nuisance upon it. Therefore, if *A. recover damages against B. for stopping his lights, and afterwards B. assign the lands [*257]

(*i*) Payne v. Rogers, 2 H. Bla. 350. Sed quære, see the remarks on Payne v. Rogers, in 11 Law Journ., N. S., Q. B. 291.

(*k*) Leslie v. Pounds, 4 Taunt. 649.

(*l*) Per Littledale, J., Laugher v. Pointer, 5 B. & C. 561.[a]

(*m*) 1 Wms. Saund. 291 e; Chitt. Plead. 6th ed. 83; ante, s. 304.

(*n*) Woodfall, L. & T. 4th ed. 728.

(*o*) Pullen v. Palmer, 3 Salk. 207; Stedman v. Bates, 1 Salk. 390.

(*p*) Bac. Ab. Joint-Tenants, (K.) (*q*) Pullen v. Palmer, 3 Salk. 207.

(*r*) Leigh v. Shepherd, 2 B. &. B. 465.[b]

(*s*) Litt. s. 317; Pullen v. Palmer, 3 Salk. 207; Dalson v. Tyson, Id. 204; Com. Dig. Abatement, (E. 10), (F. 6); Per Tindal, C. J., Wilkinson v. Hall, 1 Bing. N. C. 718;[c] Per Lord Kenyon, C. J., Harrison v. Barnby, 5 T. R. 249.

(*t*) Per Buller, and Heath, JJ., Culley v. Spearman, 2 H. Bla. 388, 389; Bac. Ab. Replevin, (K.); Com. Dig. Abatement, (F. 6). As to a demise by tenants in common, ante, ss. 32—34.

(*u*) Per Littledale, J., Rex v. Pedly, 1 A. & E. 827.[d] (*x*) Id.

[a] Eng. Com. Law Rep. 12. [b] Id. 6. [c] Id. 27. [d] Id. 28.

in which the nuisance is erected, A. may maintain another action against B. for the continuance of the nuisance; for, before the assignment, B. was answerable for all the consequential damage, from which he cannot discharge himself by assigning over, yet A. may bring the action against the assignee who took the land with the nuisance(*y*) upon it.

313. In addition to the previous remarks as to the liability of the tenant for a nuisance on the land demised,(*z*) we may add, with respect to the action for mesne profits, that this seems not to lie against a tenant whose under-tenant retains possession after the term;(*a*) and with regard to the action on the case for waste, that this is a concurrent remedy with an action of covenant, where there is a special covanant to repair,(*b*) and lies accordingly against either the lessee for waste done during the term,(*c*) or against the assignee;(*d*) and although some recent decisions have made it doubtful whether an action in the nature of waste for permissive waste can be maintained against tenants for years, yet *the better opinion seems to be, that the action is maintainable against all except tenants from year to year and strict tenants at will.(*e*)

[*258]

2. Principal and Agent—Master and Servant.

Liability of Principal and Agent.—General Rule, on what Principles founded, ss. 314—317. Limitation of the Rule, s. 318. In the case of Master and Servant, s. 319. Joint Tort-Feasors, s. 320. Liability of Person hiring Horses, &c., s. 321. Owner and Charterer of Ship, ss. 322, 323. Liability of Master for Tort of Servant, ss. 324, 325. Liability of Servants of the Crown, Justices of the Peace, Trustees, &c., ss. 326—329. Sheriff, when liable for Act of Officer, s. 330.

314. When an agent commits a tortious act under the direction or with the assent of his principal, either is liable at suit of the party injured, for the authority of the principal is no justification of the wrongful act of the agent;(*g*) and this principle, viz. that a servant cannot justify a tortious

(*y*) Woodfall L. & T. 4th ed. 672; Bul. N. P. 75.

(*z*) Ante, s. 306.

(*a*) Burne v. Richardson, 4 Taunt. 720.

(*b*) It has been held that case for permissive waste will not lie against a tenant, for a term, who has not covenanted to repair, Herne v. Benbow, 4 Taunt. 764. Nor is case the proper form of action for not repairing, where there is a covenant to leave the premises in such repair as plaintiff should put them into, Jones v. Hill, 7 Taunt. 392;[e] Burnett v. Lynch, 5 B. & C. 603;[f] Chitt. jun. Pl. 541, n. (*a*).

(*c*) Kinlyside v. Thornton, 2 W. Bla. 1111.

(*d*) Torriano v. Young, 6 C. & P. 8;[g] Sanders v. Norwood, Cro. Eliz. 683.

(*e*) Gibson v. Wells, 1 B. & P. N. R. 290; Martin v. Gilham, 7 A. & E. 540;[h] Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392;[i] 1 Wms. Saund. 323 b, n. (7); Woodfall, L. & T. 4th ed. 435. See, however, Coote, L. & T. 571, where it is said that permissive waste lies probably against all, except strict tenants at will.

(*g*) Sands v. Child, 3 Lev. 352; Jones v. Hart, 1 Lord Raym. 738; Britton v. Cole, 1 Salk. 408; per Littledale, J., Laugher v. Pointer, 5 B. & C. 559;[k] Perkins v. Smith, 1 Wils. 328, cited 1 Bing. N. C. 418;[l] Stephens v. Elwall, 4 M. & S. 259; Com. Dig. Trespass, (C. 1).

[e] Eng. Com. Law Reps. 2. [f] Id. 12. [g] Id. 25. [h] Id. 34. [i] Id. 2. [k] Id. 12. [l] Id. 27.

act under the authority derived from his master, seems equally to apply when the injury is sustained in consequence of the servant's negligent performance of the lawful orders of his master, in *which case likewise an action may be brought against either.(*h*) [*259]

315. The remedy against the master for the act of the servant is usually by an action on the case;(*i*) where, however, they are co-trespassers in law, they may be jointly charged as principals, and the damages must be assessed against all jointly, though all may not have been equally culpable.(*k*) Hence, where the owner of a carriage is sitting by the side of his servant who is driving, and the servant does an act immediately injurious to the plaintiff, trespass will lie against either or both jointly, for the act of driving by the servant is, in law, the act of the master.(*l*) So, case lies against all the proprietors of a coach for an injury resulting from the careless driving of one of them.(*m*) And an agent, as an attorney, is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal.(*n*)

*315 *a*. It must be observed, moreover, that an *express* authority from the principal need not be shown in order to render him liable [*260] for the tortious act of his servant or agent, for, as observed in a recent case, it is the known and well established rule of law, that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a book or a contract to the same extent, and with all the consequences, which follow from the same act if done by his previous authority; thus if a bailiff wrongfully take a heriot *as bailiff* for the lord, though without any command from him, a subsequent ratification of this act by the lord will render the last named party liable for the trespass. Where however the person does not at the time assume to act as agent, a party will not become liable by a subsequent ratification of the act; thus if the sheriff acting under a valid writ by the command of the court, and as the servant of the court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, does not alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action.(*o*)

(*h*) 1 Bla. Com. 16th ed. 431, n. (11). As to ejectment against a mere agent, see Doe d. Earl of Carlisle v. Wood, 8 East, 228.

(*i*) Chitt. jun. Pl. 496, n. (*a*); Morley v. Gaisford, 2 H. Bla. 442; Randleson v. Murray, 8 A. & E. 109;[m] Gibson v. Inglis, 4 Camp. 72.

(*k*) Cranch v. White, 1 Bing. N. C. 418;[n] Eliot v. Allen, 1 C. B. 18; Laugher v. Pointer, 5 B. & C. 559; Michael v. Alestree, 2 Lev. 172.

(*l*) Chandler v. Broughton, 1 Cr. & M. 29; Brucker v. Fromont, 6 T. R. 659. See Booth v. Mister, 7 C. & P. 66.[o]

(*m*) Moreton v. Hardern, 4 B. & C. 223;[p] Ogle v. Barnes, 8 T. R. 188.

(*n*) Davies v. Vernon, 6 Q. B. 448, recognising Cranch v. White, 1 B. N. C. 414;[q] Perkins v. Smith, 1 Wils. 328. See also Alexander v. Southey, 5 B. & Ald. 247;[r] Catterall v. Kenyon, 3 Q. R. 310.[s]

(*o*) Wilson v. Tummon, 6 Scott, N. R. 894, and cases there cited; Lewis v. Read, 13 M. & W. 834; Walker v. Hunter, 15 L. J., N. S., Q. B. 12. 16; Wright v. Crookes, 1 Scott, N. R. 685.

[m]Eng. Com. Law Reps. 35. [n]Id. 27. [o]Id. 32. [p]Id. 10. [q]Id. 27. [r]Id. 7. [s]Id. 43.

[*261] *316. It must now be considered as settled, notwithstanding some conflicting dicta and decisions, that for a misrepresentation by an agent, the principal will not be answerable unless he has been guilty of some *moral* fraud. The case of Cornfoot v. Fowke(*o*) affords a remarkable instance of the application of this doctrine, which of course depends upon the general question, whether or not moral fraud must be proved in order to support an action for damages occasioned by a false statement, or affirmation; this question was answered in the affirmative by the Court of Exchequer Chamber, in the recent case of Ormrod v. Huth,(*p*) which was an action for misrepresentation, as to the quality of goods sold, and in which all the previous authorities upon the subject were reviewed. In Smout v. Ilbery,(*q*) it was laid down that an *unauthorized agent* professing to bind his principal, will be liable if he "has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act;" the rule thus expressed, refers to the case of an agent, who believes that he has authority to make a statement when, in fact, he has not such authority, and renders it incumbent on him to communicate to the other party every material fact from which an inference may be drawn as to the existence, *non-existence, or revocation [*262] of the authority under which he assumes to act. We conceive that the rule laid down in Smout v. Ilbery is in no respect at variance with the decision in Ormrod v. Huth; there the false statement alleged was that samples of certain cotton were fair samples of the bulk, whereas they were not; the statement was made bonâ fide; there was no undue concealment nor reservation of facts from which any inference might be drawn as to the quality of the cotton, and the vendors were therefore held not to be liable for the statement, which was false in fact, but not fraudulently made. It may be that a professed agent is more stringently required to communicate facts respecting the existence of his authority as agent, than a vendor is to afford facilities for ascertaining the quality and condition of the article sold, but the principle applicable in each of these cases is believed to be the same.

317. The servant or agent, as already stated, is liable for a tortuous act, because he cannot justify under the command of his master: the liability of the latter for the act of the servant when acting under his implied authority, results from the fact that servants and agents are hired and selected by the master or principal to do the business required of them, and their acts consequently stand upon the same footing as his own;(*r*) as in the case of coach proprietors, who are answerable for an injury sustained by a passenger through the misconduct of their driver.(*s*)

(*o*) 6 M. & W. 358. See also, Wilson v. Fuller, 3 Q. B. 68 and 1009,[t] reversing the udgment in S. C. Id. 58.

(*p*) 14 M. & W. 651. See Bailey v. Walford, Q. B., Trin. T., May 26, 1846; Rawlings v. Bell, 14 L. J., N. S., C. P. 267.

(*q*) 10 M. & W. 10.

(*r*) Per Littledale, J., Laugher v. Pointer, 5 B. & C. 554, 555.[u]

(*s*) White v. Boulton, Peake, N. P. C. 81; Jackson v. Tollett, 2 Stark. N. P. C. 37.[x] See the cases, 2 Selw. N. P. 10th ed. 1097.

[t]Eng. Com. Law Reps. 43. [u]Id. 12. [x]Id. 3.

*318. The principal or master, then, being answerable for injuries occasioned by the negligence of those whom the law denominates his servants, the only thing necessary is, to determine between which parties such a relationship subsists, and this is not unfrequently a matter of difficulty; for although the general rule is, that that party is liable from whom the act *ultimately* originates, yet its applicability fails in one case—for, where the person who does the injury (either in person or by his servant) exercises an independent employment, the party employing him is clearly not liable;(*t*) as in the instance of a butcher who employs a drover, whose deputy does the mischief by his careless driving,(*u*) or of a builder, who contracts to make certain alterations in a club-house, together with the necessary gas fittings, and who employs a gas-fitter for the latter purpose under a sub-contract, through the negligence of whom, or of whose servants, plaintiff sustains an injury,(*x*)—in these cases the original contractor is not liable, for, between him and the person who does the injury, the relation of master and servant does not exist.(*y*) [*262 *a*]

319. But the general rule holds in the case of domestic servants, or such as are selected by the master, *and appointed to perform any particular work, although not in his immediate employ or under his superintendence: as, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself.(*z*) And the same principle prevails in the case of the owner of a farm, who has it in his own hands, but does not personally interfere in the management, and the labourers on which are hired by a bailiff of his own appointment; or in that of the owner of a mine, the working of which is superintended by a steward or manager. In these and similar cases, the under-workmen are the immediate servants of the owner, who is consequently liable for their default in doing acts on account of their employer, and in their capacity of servants;(*a*) and the remedy is either against the principal, or against the actual tort-feasors, or against both conjoined, but the intermediate agents are not liable.(*b*) [*262 *b*]

(*t*) Milligan v. Wedge, 12 A. & E. 742,[x] cited and distinguished Martin v. Temperley, 4 Q. B. 309;[a] Burgess v. Gray, 1 C. B. 578.

(*u*) Milligan v. Wedge, 12 A. & E. 737.[x]

(*x*) Rapson v. Cubitt, 9 M. & W. 710. See Wilson v. Peto, 6 Moore, 47; Witte v. Hague, 2 D. & R. 33.

(*y*) Quarman v. Burnett, 6 M. & W. 509, 510; Burgess v. Gray, 1 C. B. 578; per Parke, B., Rapson v. Cubitt, supra. See the remarks on Bush v. Steinman, 1 B. & P. 404, and Sly v. Edgley, 6 Esp. 6, in B. & C. 559, 560;[b] Per Le Blanc, J., Harris v. Baker, 4 M. & S. 29.

(*z*) Laugher v. Pointer, 5 B. & C. 554;[c] Martin v. Temperley, 4 Q. B. 298. 311, 312,[d] distinguishing Lucey v. Ingraham, 6 M. & W. 302, post, 267. See Dunford v. Trattles, 12 M. & W. 529.

(*a*) Laugher v. Pointer, 5 B. & C. 554;[c] Randleson v. Murray, 8 A. & E. 109.[f] But the plaintiff will not be entitled to recover if he might "by ordinary care have avoided the consequences of the defendant's negligence." Davies v. Mann, 10 M. & W. 548, 549; Bridge v. Grand Junction Railway Company, 3 M. & W. 246; Holden v. Liverpool New Gas & Coke Company, C. P. East. T. April 16, 1846; ante, s. 298.

(*b*) 5 B. & C. 558;[e] Stone v. Cartwright, 6 T. R. 411; Bush v. Steinman, 1 Bos. & P.

[x]Eng. Com. Law Reps. 40. [a]Id. 45. [b]Id. 12. [c]Id. 12. [d]Id. 45. [e]Id. 12. [f]Id. 35.

[*263] *320. Although, where several persons are concerned in a trespass or other tortious act, they are liable jointly or severally at the election of the party suing, yet the several liability arises out of the joint liability, and from the rule of law, that a party injured need not sue all who are guilty of the wrongful act, and two persons cannot be separately liable as principals, unless in cases where they would be jointly liable;(c) as, in the instance of an attorney and client, who may be treated as joint tespassers for an illegal arrest effected by the attorney(d) or his agent:(e) and where an arrest is made under process, which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass as well as the plaintiff;(g) but it seems that the goaler would not in such a case be liable, if the process issued out of a Court having competent jurisdiction; for it is his duty to receive a prisoner,(h) as it is that of a pound-keeper to admit a distress, even though illegally taken;(i) and therefore the party distraining is liable, and not the pound-keeper, unless it can be shewn that the latter transgressed the limits of his duty and assented to the trespass.(k)

[*264] *321. If the owner of a carriage hires horses of a stable-keeper who provides a driver, through whose negligence an injury is done, the driver must be considered as the servant of the stable-keeper, or jobmaster, and the remedy must be against the latter,(l) unless there be special circumstances shewing an assent either express or implied to the tortious act by the party hiring the horses,(m) or shewing that such party had control over the servant, and was in fact dominus pro tempore.(n) The same principle applies if the servant and horses are borrowed for the day;(o) but a person hiring or borrowing a carriage, and providing horses and servants, would be liable;(p) and it seems that it is a question for the jury whether, under given circumstances, the servants were acting as the servants of the person hiring or of the owner.(q)

322. So, where a ship is chartered for a voyage or for a definite period, it is always a question of fact under whose direction and control the vessel is at the time of the occurrence complained of; and this question must [*265] *be solved by ascertaining whose are the crew, and by considering whether the reasonable interpretation of the charter-party is, that

404, per Erle, J., 1 C. B. 593, and n. (a). Matthews v. West London Waterworks Company, 3 Camp. 403. See Wilson v. Peto, 6 Moore, 47.

(c) Per Littledale, J., 5 B. & C. 559.[s] (d) Barker v. Braham, 3 Wils. 368.

(e) Bates v. Pilling, 6 B. & C. 38.[h]

(g) Codrington v. Lloyd, 8 A. & E. 449.[i] See Sedley v. Sutherland, 3 Esp. N. P. C. 202, cited 8 A. & E. 453;[i] overruled, see p. 274. (a).

(h) Brandling v. Kent, 1 T. R. 60. 62; but see Aaron v. Alexander, 3 Camp. 35.

(i) Badkin v. Powell, Cowp. 476, cited, 1 T. R. 62.

(k) 1 Selw. N. P. 10th ed. 678, 679.

(l) Quarman v. Burnett, 6 M. & W. 499. 507, affirming the judgments of Abbott, C. J., and Littledale, J., Laugher v. Pointer, 5 B. & C. 547.[k] See per Patteson, J., 8 A. & E. 839;[l] Smith v. Lawrence, 2 Man. & Ry. 1;[m] Sammell v. Wright, 5 Esp. N. P. C. 263; Hart v. Crowley, 12 A. & E. 378.[n]

(m) M'Laughlin v. Pryor, 1 Car. & Marsh. 354;[o] S. C. 11 Law Journ., N. S., C. P. 169; 4 Scott, N. R. 655. (n) Ib.

(o) See Hart v. Crowley, 12 A. & E. 378;[n] Taverner v. Little, 5 Bing. N. C. 678.

(p) Croft v. Alison, 4 B. & Ald. 590;[p] Scott v. Scott, 2 Stark. N. P. C. 438.[q]

(q) Brady v. Giles, 1 Moo. & Rob. 494.

[s] Eng. Com. Law Reps. 12. [h] Id. 13. [i] Id. 35. [k] Id. 12. [l] Id. 35. [m] Id. 17. [n] Id. 40. [o] Id. 41. [p] Id. 6. [q] Id. 3.

the owners meant to keep the control of the vessel in their own hands,(*r*) or to make the freighter the legal owner pro tempore ;(*s*) and, perhaps, under a particular state of facts, the charterer may be answerable as well as the owner.(*t*)

323. In one case, indeed, it was held,(*u*) that by the charter of an entire ship, which contained terms of letting to hire,(*x*) the possession was parted with to the charterer, so that the owner could have no lien for the freight upon goods put on board, but subsequent cases(*y*) have narrowed the generality of this doctrine, and have decided that the question, whether the possession of the ship has or has not been given up to and been taken by the charterers, must depend upon the terms of the instrument taken altogether, or upon the purpose and object of it.(*z*)

*324. Where the injury is committed by the servant wilfully, while not employed in the master's service, and while not acting within the scope of his authority, the remedy must be against the servant only.(*a*) As if a servant, authorized merely to distrain cattle damage feasant, drives cattle from the highway into his master's close and there distrains them ;(*b*) or if he wantonly, and in order to effect some purpose of his own, strikes the plaintiff's horses, and thereby produces an accident; but if he so struck, though injudiciously, in order to perform his master's orders, and in the pursuance of his employment, the master would be liable.(*c*) So, if the servant be guilty of negligence, productive of an injury whilst on his master's business, as while driving his master's carriage, although he may at the time be going out of the direct road for some purpose of his own, the master will be answerable ;(*d*) but no liability attaches to the latter, if the servant without his leave or knowledge take his carriage, and with it commit an injury, because in this case the master has not entrusted the servant with the carriage.(*e*) [*266]

(*r*) Fenton v. The City of Dublin Steam Packet Company, 8 A. & E. 835;[r] Fletcher v. Braddick, 2 B. & P., N. R. 182, recognized 5 B & C. 556.[g]

(*s*) Newberry v. Colvin, 7 Bing. 190,[t] reversing the judgment of K. B. in Colvin v. Newberry, 8 B. & C. 166;[u] Trinity House v. Clark, 4 M. & S. 288.

(*t*) Per Lord Denman, C. J., and Patteson, J., 8 A. & E. 842, 843.[r]

(*u*) Hutton v. Bragg, 2 Marsh. 339 ;[s] judgment in Belcher v. Capper, 11 Law Journ. N. S., C. P. 286.

(*x*) Judgment in Saville v. Campion, 2 B. & Ald. 512.

(*y*) Trinity House v. Clark, 2 M. & S. 288; Per Burrough J., Christie v. Lewis, 2 B. & B. 442 ;[x] Yates v. Railston, 8 Taunt. 293 ;[y] Tate v. Meek, 8 Taunt. 280 ;[y] Saville v. Campion, 2 B. & Ald. 503.

(*z*) Judgment in Dean v. Hogg, 10 Bing. 350, and in Belcher v. Capper, 11 Law Journ., N. S., C. P. 286.

(*a*) Lyons v. Martin, 8 A. & E. 512 ;[a] M'Manus v. Crickett, 1 East, 106; Middleton v. Fowler, 1 Salk. 282; Lamb v. Palk, 9 C. & P. 629.[b] See Attorney-General v. Siddon, 1 Cr. & J. 220; Goodman v. Kennell, 3 C. & P. 167.[e]

(*b*) Lyons v. Martin, 8 A. & E. 512.[a]

(*c*) Croft v. Alison, 4 B. & Ald. 590. 592 ;[d] Lamb v. Palk, 9 C. & P. 629 ;[b] Gregory v. Piper, 9 B. & C. 591 ;[e] Huzzey v. Field, 2 Cr. M. & R. 432.

(*d*) Joel v. Morison, 6 C. & P. 501 ;[f] Sleath v. Wilson, 9 C. & P. 607.[b]

(*e*) Sleath v. Wilson, 9 C. & P. 607. 612 ;[b] Lamb v. Palk, 9 C. & P. 629 ;[b] Goodman v. Kennell, 3 C. & P. 167 ;[g] Joel v. Morison, 6 C. & P. 501.[f]

[r] Eng. Com. Law Reps. 35. [s] Id. 12. [t] Id. 20. [u] Id. 15. [x] Id. 6. [y] Id. 4. [a] Id. 35. [b] Id. 38. [c] Id. 14. [d] Id. 6. [e] Id. 17. [f] Id. 25. [g] Id. 14.

[*267] *325. There are also cases in which, although the relationship of master and servant does not really exist, there is yet a primâ facie liability attaching to the apparent principal, which however can be rebutted by the particular facts; thus, a licensed pilot going on board and taking charge of a vessel when required by the owner so to do, under the stat. 6 Geo. 4, c. 125, s. 72, must be considered, when so required and employed, as acting under some of the provisions of that statute, and not as the private servant of the owner, who is, therefore, protected from his primâ facie liability in respect of an injury occasioned by the act of the pilot, whilst so employed by the owner.(g) So, the captain of a man-of-war is not responsible for the default of a lieutenant, whose watch it was, and who had the actual management of the vessel when an injury was committed.(h) Nor was the Postmaster-General held liable for a loss attributable to the misconduct of a clerk appointed by him, on the ground that such clerk was not to be considered as his servant.(i) And where A. entered into a contract with the Postmaster-General to supply and keep in order a mail-coach, and B. was hired to drive the mail by certain persons who had contracted with the Postmaster-General for the purpose of horsing it; it was held that B. could not maintain an action on the case against A. for an injury resulting from [*268] his negligence in supplying a *defective coach, for there was no privity between the parties; and in this case the plaintiff would appear to have been without remedy, since an action would not have lain against the Postmaster-General,(k) nor against his immediate employers.(l)

326. We have stated(m) that servants of the Crown are, from motives of public policy, to be considered in the light of mere agents, and as such are not personally chargeable on contracts entered into by them in their official capacity; and for similar reasons(n) an action ex delicto does not lie against a judge civil(o) or ecclesiastical,(p) acting judicially in a matter within the scope of his jurisdiction.(q) So, the steward of a court baron is a judicial officer, and therefore not liable if process issues, as in regular course it ought, to the bailiffs of the court; but if he so far mixes himself up personally with the party to the cause, as to issue the writ to special bailiffs nominated by his attorney on taking an indemnity, the steward may reasonably be considered as having identified himself with the bailiffs, and as having sanctioned what they may do in executing the process.(r)

(g) Lucey v. Ingram, 6 M. & W. 302;♦ M'Intosh v. Slade, 6 B. & C. 657.[b]
(h) Nicholson v. Mouncey, 15 East, 384, and cases there cited.
(i) Lane v. Cotton, 1 Salk. 15; S. C. 15 Mod. 472; Per Lord Ellenborough, C. J., 15 East, 392; Whitfield v. Lord Despencer, Cowp. 754.
(k) Winterbottom v. Wright, 11 Law Journ., N. S., Exch. 415; S. C. 10 M. & W. 109.♦
(l) Priestley v. Fowler, 3 M. & W. 1.♦
(m) Ante, s. 202.
(n) See Johnstone v. Sutton, 1 T. R. 513, 514.
(o) Dicas v. Lord Brougham, 6 C. & P. 249;[i] Tinsley v. Nassau, Mo. & Mal. 52; Johnstone v. Sutton, 1 T. R. 513; Per Holt, C. J., 1 Lord Raym. 468; Garnet v. Ferrand, 6 B. & C. 611.[k]
(p) Ackerley v. Parkinson, 3 M. & S. 411. 425; Beaurain v. Scott, 3 Camp. 388.
(q) Id. See Wingate v. Waite, 6 M. & W. 739. 746.
(r) Holroyd v. Breare, 2 B. & Ald. 473. See the judgment in Bradley v. Carr, 3 Scott, N. R. 521. 528.

[b]Eng. Com. Law Reps. 13. [i]Id. 25. [k]Id. 13. ♦Re-printed at $2.50 per vol.

*327. With respect to persons having a limited authority, such as commissioners of bankrupt, the rule is laid down, that if they do [*269] any act beyond the limit of their authority, they thereby submit themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby rendered liable to an action:(s) and this seems to be equally true of military and naval commanding officers.(t) And although persons exercising judicial functions, as commissioners of a court of requests, are liable in trespass for an excess of jurisdiction, yet the officer executing the warrant of the court may justify under it, if good in form, though not otherwise;(u) and it is clear that the party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction.(v)

328. So magistrates acting in discharge of their duty are irresponsible, even where the circumstances under which they are called upon to act would not have supported the complaint, provided that such circumstances were not disclosed to them at the time;(w) and where *their authority is given by statute, and they appear to have acted within the [*270] jurisdiction so given, and to have done all that the particular statute requires them to do in order to originate their jurisdiction, their conviction drawn up in due form and remaining in force is a protection and conclusive evidence for them, in any action which may be brought against them for the act so done, and neither the magistrates so acting, nor the officer executing the warrant can be treated as trespassers:(x) and the constable or other officer, whether sued jointly with the justice or not, may, after demand of the warrant and compliance therewith, justify under the warrant notwithstanding a defect of jurisdiction in the justice who issued the warrant;(y) but the party can only justify that which he lawfully did under the warrant, and will be liable, if guilty of any excess, although no demand were made of the warrant.(z) And it seems, that, in the case of a justification at common law by a constable under the warrant of a justice of the peace, as in an action of replevin to which the stat. 24 Geo. 2, c. 44, s. 6, does not apply,(a) a plea is bad which does not *shew that the justice had jurisdiction [*271] over the subject-matter for which the warrant is granted.(b)

(s) Per Abbott, C. J., Doswell v. Impey, 1 B. & C. 169, 170,[l] overruling Miller v. Seare, 2 M. & W. 1141.♦

(t) Johnstone v. Sutton, 1 T. R. 510, affirmed Id. 784, and cases there cited; Warden v. Bailey, 4 Taunt. 67; Bradley v. Arthur, 4 B. & C. 292.[m]

(u) Carratt v. Morley, 1 A. & E., N. S. 18;[n] Andrews v. Marris, Id. 3, and cases there cited. See Morris v. Parkinson, 1 Cr. M. & R. 163.

(v) Judgment, 1 A. & E., N. S. 28.[n]

(w) Pike v. Carter, 3 Bing. 78;[o] Lowther v. Earl of Radnor, 8 East, 113. A calendar month's notice of action must be given exclusive of the day of giving the same, and of suing out the writ, 24 Geo. 2, c. 44, s. 1; Young v. Higgon, 6 M. & W. 49.♦ See Rix v. Borton, 12 A. & E. 470.[p]

(x) Per Abbott, C. J., Basten v. Carew, 5 B. & C. 652, 653;[q] S. C. 5 D. & R. 558; Baylis v. Strickland, 1 Scott, N. R. 540; Fernley v. Worthington, 1 Scott, N. R. 432; Painter v. The Liverpool Gas Company, 3 A. & E. 433;[r] Webb v. Batchelour, Ventr. 273.

(y) Stat. 24 Geo. 2, c. 44, s. 6; Atkins v. Kilby, 11 A. & E. 777.[s] See Charleton v. Alway, 11 A. & E. 993.[s] (z) Peppercorn v. Hofman, 9 M. & W. 618. 628.♦

(a) Fletcher v. Wilkins, 6 East, 283.

(b) See the judgment in Morrell v. Martin, 4 Scott, N. R. 300, where the cases are reviewed. Mitchell v. Foster, 12 A. & E. 472;[t] George v. Chambers, 11 M. & W. 149.♦

[l]Eng. Com. Law Reps. 8. [m]Id. 10. [n]Id. 41. [o]Id. 11. [p]Id. 40. [q]Id. 12. [r]Id. 30. [s]Id. 39. [t]Id. 40. ♦Reprinted at $2.50 per vol.

328*a*. The law respecting the validity of warrants of commitment has been much considered in several recent cases, to which we must content ourselves with simply referring, but in which the reader will find the law and cases upon this important and comprehensive subject. In Howard v. Gossett,(*c*) which is now pending before the Court of Exchequer Chamber, the question was as to the validity of a warrant for arresting the plaintiff, issued by the Speaker of the House of Commons. In this case, which, when finally determined, will be the leading decision respecting the validity of warrants, will be found, it is believed, all the authorities bearing upon this subject. In Van Sandau v. Turner,(*d*) the inquiry was respecting the sufficiency of a justification of arrest and imprisonment, under a warrant issued by a judge of the Court of Review. And in Thomas v. Hudson,(*e*) which was an action against the keeper of the Queen's Prison for an escape, the Court of Queen's Bench held that the defendant, who had discharged
[*272] the prisoner from custody under *an order of one of the Commissioners of the Court of Bankruptcy, acting judicially and in a matter over which he had jurisdiction, was protected by such order.(*f*)

329. Where it is provided by statute, that commissioners, or parliamentary trustees entrusted with the conduct of public works, and acting gratuitously, should sue and be sued by their clerks or other servants, no action is maintainable against the latter, unless it could have been supported against the former in their public capacity;(*g*) and although when commissioners under an act of Parliament order something to be done, which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, yet they are not answerable for the misconduct of such as they are obliged to employ, and against whom, consequently, the remedy for such misconduct must be enforced.(*h*) It may indeed be laid down as a rule, applicable in ordinary cases, that, where commissioners appointed under an act of Parliament contract with a person carrying on an independent business for the performance of work which they could not
[*273] execute for themselves, and which they are justified in ordering to be *executed, under the provisions of the Act, the contractor and not the commissioners will be liable for any injury resulting from the negligent or improper performance of such work.(*i*) But a substantive and immediate officer of the Crown, charged with the execution of a certain limited duty for which he receives compensation, is clearly liable for an

(*c*) 14 L. J., N. S., Q. B. 367. In Howard v. Gossett, and Stockdale v. Hansard, 9 A. & E.,[u] and 11 A. & E. 253. 297;[x] and the Case of the Sheriff of Middlesex, 11 A. & E. 273,[x] the extent and nature of the privileges of the House of Commons were elaborately examined.

(*d*) 6 Q. B. 773; see Green v. Elgie, 5 Q. B. 99.[y]

(*e*) 14 M. & W. 353,[♦] this case is now pending before the Court of Exchequer Chamber.

(*f*) See also Watson v. Bodell, 14 M. & W. 57;[♦] Savory v. Chapman, 11 A. & E. 829.[a]

(*g*) Per Best, C. J., Hall v. Smith, 2 Bing. 158;[b] Cane v. Chapman, 5 A. & E. 647. 658, 659;[c] Wormwell v. Hailstone, 6 Bing. 668;[d] Jones v. Gooday, 9 M. & W. 736.[♦]

(*h*) Per Best, C. J., 2 Bing. 158[b] et seq.; Sutton v. Clarke, 6 Taunt. 29.[e] See Harris v. Baker, 4 M. & S. 27; Boulton v. Crowther, 2 B. & C. 703,[f] and cases there cited; Jones v. Bird, 5 B. & Ald. 837.[g]

(*i*) Allen v. Hayward, 15 L. J., N. S., Q. B. 99; see also Davis v. Curling, Id. 56.

[u]Eng. Com. Law Reps. 36. [x]Id. 39. [y]Id. 48. [a]Id. 39. [b]Id. 9. [c]Id. 12. [d]Id. 19. [e]Id. 1. [f]Id. 9. [g]Id. 7. [♦]Reprinted at $2.50 per vol.

injury occasioned by the neglect of his duties.(*k*) For it is a general principle, that where the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures, and if several are jointly bound to perform such duty they will be liable, jointly and severally, for their failure or refusal to perform it.(*l*)

330. "The ground of the sheriff's liability for the acts of his bailiff is, that he is casting upon another a duty which the law imposes upon him, and consequently that he is acting by a servant;"(*m*) he will, therefore, according to ordinary principles, be liable for an illegal or fraudulent act committed by his bailiff, even though he were not personally cognizant of the transaction, and may be sued jointly with him,(*n*) (as if the bailiff *seize the goods of the wrong party by mistake,(*o*) or arrest [*274] a person under a fi. fa. (*p*)), unless the act were done under circumstances constituting him the special bailiff of the party; as, where the attorney of the plaintiff in a cause requested of the sheriff a particular officer—delivered the warrant to that officer—took him in his carriage to the scene of action, and there encouraged an illegal arrest, it was held that the sheriff was not liable for an escape.(*q*) Nor will the sheriff be liable if the wrong complained of be neither expressly sanctioned by him, nor impliedly committed by his authority; as, where the bailiff derived his authority not from the sheriff but from the plaintiff, or from some other party at whose instigation he acted;(*r*) for although the general rule is, that the act of the officer is in point of law the act of the sheriff, yet it is not competent to one, whose act produces the misconduct of the bailiff, to say, that the act of the officer, done in breach of his duty to the sheriff, and which he has himself induced, is the act of the sheriff.(*s*) When, therefore, an action *had been commenced against the sheriff and his officer for [*274 *a*] seizing a horse, and it appeared that the execution creditor had identified himself with the sheriff by directing the seizure of the horse in question, the court, on application by the sheriff, directed that the action should be continued, the name of the execution creditor being substituted for those of the sheriff and his officer.(*t*)

(*k*) Barry v. Arnaud, 10 A. & E. 646;[h] Schinotti v. Bumsted, 6 T. R. 646; Per Best, C. J., Henley v. The Mayor of Lyme, 5 Bing. 107,[i] affirmed 1 Bing. N. C. 222.[k]

(*l*) Ferguson v. Earl of Kinnoull, 9 Cla. & Fin. 251. 279, recognising Sutton v. Johnston, 1 T. R. 493.

(*m*) Per Tindal, C. J., Brown v. Copley, 8 Scott, N. R. 362.

(*n*) Per Ashhurst, J., Woodgate v. Knatchbull, 2 T. R. 154; Raphel v. Goodman, 8 A & E. 565;[l] Sturmy v. Smith, 11 East, 25; Price v. Peek, 1 Bing. N. C. 380;[k] Crowder v. Long, 8 B. & C. 602.[m] See Peshall v. Layton, 2 T. R. 712; Thomas v. Pearse, 5 Price, 578.

(*o*) Jarmain v. Hooper, 7 Scott, N. R. 663.

(*p*) Smart v. Hutton, 8 A. & E. 568, n.[n] See Belshaw v. Marshall, 4 B. & Ad. 336.[o]

(*q*) Doe v. Trye, 5 Bing. N. C. 573;[p] Ford v. Leche, 6 A. & E. 699,[q] cited and distinguished in Alderson v. Davenport, 13 M. & W. 42; Per Buller, J., De Moranda v. Dunkin, 4 T. R. 121.

(*r*) Cook v. Palmer, 6 B. & C. 739;[r] Crowder v. Long, 8 B. & C. 598;[m] Tompkinson v. Russell, 9 Price, 287; Bowden v. Waithman, 5 Moore, 183; Stuart v. Whittaker, Ry. & M. 310; Higgins v. M'Adam, 3 Y. & J. 1.

(*s*) Per Bayley, J., Crowder v. Long, 8 B. & C. 603, 604.[m]

(*t*) Brown v. Ludham, 6 Scott, N. R. 934.

[h]Eng. Com. Law Reps. 37. [i]Id. 15. [k]Id. 27. [l]Id. 35. [m]Id. 15. [n]Id. 35. [o]Id. 24. [p]Id. 35. [q]Id. 33. [r]Id. 13.

330 *a*. As to the position of the sheriff with respect to the county court, "there are," as observed in a recent case, "strong authorities to shew that he is a judicial and not a mere ministerial officer," and that he will not therefore be liable for the misfeasance of his officer in executing process issuing out of such court,(*u*) as in trover for a conversion by his bailiff of goods seized under a process of attachment, but after notice of a supersedeas.(*x*)

330 *b*. Not only will the sheriff, as a general rule,(*y*) be liable for the wrongful act of his officer, but the plaintiff in the original action,(*z*) or the attorney who *directs* (*a*) the execution of a warrant, will be liable in trespass if it prove bad.

[*274 *b*]

*CHAPTER III.

HUSBAND AND WIFE—INFANT, &c.

When the Husband must be sued alone, ss. 331, 332. When the Wife may be sued alone,—Her Liability if she survives Husband, s. 333. When the Husband may be sued alone or jointly with his Wife, ss. 334—336. When the Husband and Wife must be sued jointly, s. 337. Infant, Non Compos Mentis, Outlaw, ss. 338, 339.

331. WHERE goods have been converted by a feme covert by an act implying a transfer of property in them, and not amounting to a total destruction, it seems that trover *may* be brought against the husband alone, for the conversion is in law the act of the husband, and cannot, in legal contemplation, be to the use of the wife;(*a*) but, if the latter be joined as a defendant, the court will, after verdict, presume that the conversion was merely temporary and did not effect an ultimate change of property, and was, consequently, such as the wife might be guilty of.(*b*) There may, however, be a distinction in this respect between the actions of detinue and trover, for, in the former, the plaintiff seeks to recover the goods in specie, but in the latter he only asks for damages:(*c*) and therefore, if the delivery be to hus-

(*u*) Brown v. Copley, 8 Scott, N. R. 350, citing 2 Roll. Ab. 552, pla. 10; Tinsley v. Nassau, Moo. & Mal. 52; Pitcher v. King, 9 A. & E. 288;[a] Tunno v. Morris, 2 Cr. M. & R. 298. See Cameron v. Reynolds, 1 Cowp. 403; cited Bull. N. P. 64, n. (*a*).

(*x*) Brown v. Copley, 8 Scott, N. R. 350.

(*y*) See Magnay v. Burt (in error), 5 Q. B. 381;[b] Riseley v. Ryle, 11 M. & W. 16.

(*z*) Jarmain v. Hooper, 7 Scott, N. R. 663.

(*a*) Green v. Elgie, 5 Q. B. 99,[b] overruling Sedley v. Sutherland, 3 Esp. 202.

(*a*) Berry v. Nevys, Cro. Jac. 551. See 2 Wms. Saund. 47 i.; post, s. 334.

(*b*) Per Bayley, J., Keyworth v. Hill, 3 B. & Ald. 687, 688;[c] Draper v. Fulkes, Yelv. 165. See the form of a declaration in trover against both the husband and wife, alleging a conversion by the wife to the use of the husband, Catterall v. Kenyon, 3 Q. B. 310.[d]

(*c*) Per Best, J., 3 B. & Ald. 689.[c]

[a]Eng Com. Law Reps. 36. [b]Id. 45. [c]Id. 5. [d]Id. 43.

band and wife, the action of detinue *should, it seems, be brought against the husband alone.(d) [*275]

332. If the husband survive no action lies against him for the tort of his wife, committed either before or during coverture,(e) though, if he has been a joint tortfeasor with her, he is still liable in respect of his own tortious act; but if the husband of an executrix waste the goods, this is a devastavit in the feme, on which the husband surviving shall not be charged, unless judgment was recovered against husband and wife during coverture.(g) It must, however, be observed that, if the wife was entitled to any choses in action which the husband did not reduce into possession in her lifetime, so that it becomes necessary for him to take out administration to her, he will be liable, as her administrator, for her devastavit, by virtue of the stat. 30 Car. 2, c. 7, explained and made perpetual by 4 & 5 Will. & M. c. 34, s. 12.(h) Again, if the husband of lessee for life does waste, and the wife dies before a recovery against them, the husband shall not be charged;(i) but if baron, possessed for years in right of the feme, does waste, and afterwards the feme dies, an action for waste lies against the baron, because the law gives the term to him.(k)

*333. A married-woman cannot be sued alone for her separate tort, subject, however, to the exceptions already noticed;(l) but she remains liable after her husband's death for her tortious act, committed either before or during marriage, and if jointly concerned with her husband in committing the injury, so that an action would have lain against both, it seems that her liability would equally survive;(m) therefore, if feme lessee for life marries and the husband does waste, a right of action for such waste will survive against the feme;(n) and so, if the baron and feme are joint lessees for years or lessees for life, provided, in the latter case, the feme agrees to the estate after the baron's death.(o) The rule laid down as to the liability of a feme executrix or administratrix surviving her husband, for his devastavit of the goods of the testator or intestate, is, that if she was executrix or administratrix before the coverture she shall be charged for the act of the husband after his death; but that if a feme covert be made executrix or administratrix, and the probate or letters of administration be taken out by the husband in his wife's name, but either against or without her consent, and she do not afterwards intermeddle in the administration, she may renounce after his death, and avoid the consequences of his devastavit.(p) [*276]

(d) Per Dodderidge, J., Isaac v. Clarke, 2 Buls. 308; Marshe's case, 1 Leo. 312; 38 Edw. 3. 1, a; post, s. 337.
(e) Hammond, Parties to Actions, 184.
(g) Mounson v. Bourn, Cro. Car. 518, 519; Com. Dig. Bar. and Feme, (2, B.), (2, C.); Hammond, Parties to Actions, 192.
(h) 2 Williams on Executors, 3rd ed. 1441.
(i) Com. Dig. Bar. and Feme, (2, C.); but see Sacheverel v. Bagnoll, Cro. Eliz. 357.
(k) Bac. Ab. 7th ed. Waste, (H).
(l) Bac. Ab. Bar. and Feme, (L.); ante, ss. 99, 100. 222.
(m) Per Bosanquet, J., Vine v. Saunders, 4 Bing. N. C. 102.*
(n) Bac. Ab. 7th ed. Waste, (H). (o) Ib.
(p) 2 Williams on Executors, 3rd ed. 1444, 1445.

*Eng. Com. Law Reps. 33.

334. It is now expressly decided that husband and wife are jointly liable in trespass for their joint act, as *for their joint assault or battery; [*277] and in this case it is consequently unnecessary to bring two actions:(q) and where, in trespass against baron and feme for entering plaintiff's house and taking his goods and converting them to their own use, it was moved in arrest of judgment, that the feme could not convert to her own use, the Court held trespass maintainable, the conversion not being the gist of this action.(r) In trover against husband and wife, the conversion should not be laid to their joint use, but to the use of the husband,(s) yet if so laid the declaration will be sufficient after verdict; and the conversion itself being a tortious act of which the wife may, under certain circumstances, be guilty, as in the case of a total destruction,(t) she may, it seems, be charged with the conversion, and the declaration may state that husband and wife converted the goods, omitting the words, to their own use,(u) or that the wife converted them to the use of the husband.(x) But for a conversion by the wife during coverture, an action may be brought against the husband alone, for the act of the wife may be *considered, in [*278] law, as the act of the husband.(y) Again, case will perhaps lie against husband and wife for retaining and keeping the servant of another, although the feme cannot enter into a contract: for the receiving and keeping the servant without any contract may, perhaps, constitute a trespass with which the feme may be charged.(z)

335. With regard to the lands of a married woman it should be observed, that an action on the case, in the nature of waste, lies against husband and wife upon a lease for life or years to both jointly, or to the feme whilst sole, in which latter case the wife ought, perhaps, to be joined in the action;(a) and the Courts consider the rent issuing from the lands of a married woman to be so much in the nature of a personal chattel belonging to the husband, that he may distrain and even avow alone for such rent accruing during the coverture;(b) although the wife may generally join with her

(q) Vine v. Saunders, 4 Bing. N. C. 96,[f] where the cases are reviewed; Watson v. Thorpe, Cro. Jac. 239; admitted, Berry v. Nevys, Cro. Jac. 661; Per Bayley, J., Keyworth v. Hill, 3 B. & Ald. 687;[g] White v. Eldridge, 1 Lord Raymond, 443; Smalley v. Kerfoot, 2 Stra. 1094.

(r) Smalley v. Kerfoot, 2 Stra. 1094.

(s) Rhemes v. Humphreys, Cro. Car. 254. See Catterall v. Kenyon, 11 Law Journ., N. S., Q. B. 260.

(t) Keyworth v. Hill, 3 B. & Ald. 685,[g] recognized 4 Bing. N. C. 102;[f] Draper v. Fulkes, Yelv. 165; Coxe v. Cropwell, Cro. Jac. 5.

(u) 2 Selw. N. P. 10th ed. 1368.

(x) Catterall v. Kenyon, 11 Law Journ., N. S., Q. B. 260.

(y) 2 Roper, H. & W. 2nd ed. 127.

(z) Fawcet v. Beavres, 2 Lev. 63, cited in Com. Dig. Bar. & Feme, (Y.), in Bac. Ab. Bar. & Feme, (L.), and in 4 Bing. N. C. 98.[h]

(a) Bac. Ab., 7th ed., Waste, (H.); Com. Dig., 5th ed., Bar. & Feme, (Y.), n. (f) In ejectment *by* husband and wife, the demise must be stated according to the title of the landlord; therefore if husband, seised in fee jure uxoris, has made a lease jointly with his wife, and that lease being forfeited or expired he brings ejectment, and shows a demise to the plaintiff by himself only, the declaration will be bad. Coote, L. & T. 576; Bac. Ab. 7th ed. Bar. & Feme, (D. 3); ante, s. 285.

(b) Coote, L. & T. 432; Osborne v. Wickenden, 2 Saund. R. 197.

[f]Eng. Com. Law Reps. 33. [g]Id. 43. [h]Id. 33.

husband.(*c*) So, after the death of the wife he may distrain *and avow for all rent due in her right, even if it accrue to her in autre [*279] droit, as executrix or administratrix;(*d*) but it should appear upon the record that *he* was entitled to make the distress.(*e*)

336. An avowry by the husband imports a justification of the taking, either in his own right or in right of his wife.(*g*) An avowry by the husband in right of his wife, for rent in arrear before marriage, will not be bad because it alleges the rent to be due to both husband and wife, instead of to the wife alone, for the avowry being for rent in arrear, to say that it was in arrear to both husband and wife is but surplusage.(*h*) If, however, there be lessee for years and the reversion descend on a married woman and afterwards the rent be in arrear, and the husband distrain and the lessee bring replevin, the husband ought to avow in the name of himself and his wife, and not in the name of himself only, for the avowry is to be made according to the reversion, which is in the wife, whose life moreover is averred.(*i*)

337. The wife must, in general, be joined as a defendant for a tortious act committed by her whilst sole;(*k*) as in trover, where both the finding and conversion were *before marriage;(*l*) and if goods are bailed to [*280] a feme sole who subsequently marries, detinue may, and perhaps should, be brought against husband and wife jointly.(*m*) So, for a tort by the wife during coverture she must (subject to the previous remarks)(*n*) be joined.(*o*) So, the wife must be joined in case for her libel or slander;(*p*) though for words spoken by husband and wife there must be separate actions, the one against husband and wife, the other against husband only, for the wife is not answerable for the husband's tort.(*q*) Lastly, where a feme sole executrix or administratrix wastes the goods of the testator or intestate, and subsequently marries, an action for the devastavit must be brought against husband and wife jointly, for the husband is liable as long as the coverture lasts.(*r*)

338. An infant, although incapable of entering into a contract except for necessaries, is liable for his tortious acts, as if he commit an assault, or utter slander,(*s*) or in person commit a trespass;(*t*) but he cannot be made

(*c*) Woodfall, L. & T. 4th ed. 315; Gravenor v. Woodhouse, 1 Bing. 38;[l] S. C. 2 Bing. 71;[k] Parry v. Hindle, 2 Taunt. 180.

(*d*) Woodfall, L. & T. 4th ed. 315; stat. 32 H. 8, c. 37, s. 3.

(*e*) Wise v. Bellent, Cro. Jac. 442; Gravenor v. Woodhouse, 1 Bing. 38;[l] S. C. 2 Bing. 71;[m] Osborne v. Wickenden, 2 Saund. R. 197. (*g*) Ib.; Com. Dig. Pleader, (3, K. 13).

(*h*) Bowles v. Poore, Cro. Jac. 282.

(*i*) Bac. Ab. Replevin, (K.); Woodfall, L. & T. 4th ed. 729.

(*k*) 2 Roper, Husband and Wife, 2nd ed. 127; Com. Dig. Bar. & Feme, (Y.); Bac. Ab. Bar. and Feme, (L.). Where the conversion is during coverture, see ante, 331.

(*l*) Com. Dig. Bar. & Feme, (Y.), As to a joint tort by husband and wife, ante, s. 334.

(*m*) Co. Litt. 351, b.; Com. Dig. Bar. & Feme, (Y.); 1 Selw. N. P. 10th ed. 657; but see Bac. Ab. Detinue, (A.).

(*n*) Ante, ss, 331, 334.

(*o*) Com. Dig. Bar. & Feme, (Y.); Bac. Ab. Bar. & Feme, (L.).

(*p*) Head v. Briscoe, 5 C. & P. 484,[n] where the wife had committed adultery, and was living separate from her husband.

(*q*) Swithin v. Vincent, 2 Wils. 227; Bac. Ab. Bar. and Feme, (L.); 1 Selw. N. P. 10th ed. 298.

(*r*) 2 Williams on Executors, 3rd. ed. 1441.

(*s*) Per Lord Kenyon, C. J., Jennings v. Rundall, 8 T. R. 337; Noy, 129.

(*t*) See Co. Litt. 180, b., n. (4), by Mr. Hargrave; Johnson v. Pye, 1 Lev. 169.

[l]Eng. Com. Law Rep. 8. [k]Id. 9. [l]Id. 8. [m]Id. 9. [n]Id. 24.

[*281] *liable by merely framing the declaration in tort, when the action is substantially grounded on a contract; as by suing in trover for goods delivered under a contract,(x) or in case for an injury done to a horse let on hire,(y) for a deceitful warranty of goods sold by the infant,(z) or for fraudulently representing himself to be of age, and as such executing a mortgage to the plaintiff.(a) But it has been held that detinue would lie against an infant, who fraudulently received goods, concealing the fact of his minority, and wrongfully detained them;(b) and money had and received, was held to lie against an infant, to recover money which he had embezzled, the action being founded in tort.(c)

339. A person non compos mentis is liable civilly for a trespass committed by him,(d) although he is incapable of design; for the general rule is, that whenever one person receives an injury directly from the voluntary act of another, this is a trespass, although there were no design to injure.(e) With respect to an outlaw or a person attainted, he is clearly liable for a tort, and cannot plead as a defence, that which operates only as a personal disability.(g)

[*282] *CHAPTER IV.

1. BANKRUPTCY AND INSOLVENCY, ss. 340—343.
2. EXECUTORS AND ADMINISTRATORS, ss. 344—348.

1.—Bankruptcy and Insolvency.

How the Assignees of a Bankrupt should be sued, s. 340. Liability of Bankrupt after Certificate, ss. 341, 342. Insolvency, s. 343.

340. There is no peculiarity to notice, where the assignees of a bankrupt are made defendants in an action ex delicto, for at law they cannot be sued in that capacity;(a) and therefore for a tortious act done by one of the assignees only, the action shall be brought against him alone, the others not being answerable.(b)

341. As to the continuing liability of the bankrupt, it must be observed that he is only discharged by his certificate from debts or claims provable under the commission; and since the damages recoverable for a tortious act are in their nature unliquidated, are ascertainable only by the intervention

(x) Manby v. Scott, 1 Sid. 129. (y) Jennings v. Rundall, 8 T. R. 335.
(z) Green v. Greenbank, 2 Marsh. R. 485. See Grove v. Nevill, 1 Keb. 778; Howlett v. Haswell, 4 Camp. 118.
(a) Johnson v. Pye, 1 Lev. 169; S. C, 1 Keb. 905. 913; recognized, 8 T. R. 337.
(b) Mills v. Graham, 1 B. & P. N. R. 140. 145.
(c) Bristow v. Eastman, 1 Esp. N. P. C. 172.
(d) Per Curiam, Weaver v. Ward, Hob. 134; Bac. Ab. Trespass, (G.)
(e) Bac. Ab. Trespass, (G.)
(g) Ante, s. 228; Hastings v. Blake, Noy, 1; Bac. Ab. 7th ed, Outlawry, (D. 3.)
(a) Ante, s. 229.
(b) Flath. Arch. Bankruptcy, 399; Bac. Ab. Bankrupt, (D.)

of a jury, and do not constitute a debt until judgment is obtained,(*c*) it follows *that a certificated bankrupt will remain liable for all torts committed by him, prior to the date of his certificate.(*d*) [*283]

342. In determining as to a certificated bankrupt's liability, in the case just stated, the form of action is material, for whenever it is necessary to have recourse to a special action on the case, or to an action of trespass to recover damages, the party cannot come in under the commission;(*e*) and even where the plaintiff has his election to sue in tort, or in form ex contractu, he may, by adopting the former mode of declaring, prevent the bankruptcy and certificate from being pleaded in bar.(*g*) Hence bankruptcy is no bar to an action for mesne profits,(*h*) or to an action of trover, where the conversion was before the bankruptcy, although the plaintiff might have elected to waive the tort, and sue for money had and received;(*i*) nor to an action on the case for *selling out stock contrary to orders, where likewise the action might have been framed in assumpsit.(*k*) [*284]

343. The preceding remarks as to the continuing liability of a bankrupt, are equally applicable to the case of an insolvent tort-feasor; and it has therefore been held, that a plea of discharge under the Insolvent Act, 53 Geo. 3, c. 102, was no bar to an action of trespass,(*l*) or of trespass for mesne profits, even though accruing before the discharge;(*m*) and an insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced and judgment by default suffered prior to his first imprisonment, as in an action of replevin where judgment was signed for want of an avowry.(*n*)

(*c*) Walter v. Sherlock, cited 3 Wils. 272. See Longford v. Ellis, 1 H. Bla. 29, n. (*a*). Where a verdict in trover was obtained in the vacation against one who became bankrupt in the following term before final judgment was signed, such judgment, signed subsequently in the same term, formerly related back to the first day of the term; and the debt thereby created was consequently barred by the certificate; Greenway v. Fisher, 7 B. & C. 436;[o] but now all judgments, whether interlocutory or final, shall be entered of the day when signed, and shall have relation to no other day; H. T. 4 Will. 4, reg. 3; 1 Chitt. Arch. Pr. 7th ed. 341.

(*d*) Per Curiam, Lloyd v. Peell, 3 B. & Ald. 408.[p]

(*e*) Per Ashhurst, J., Utterson v. Vernon, 3 T. R. 547, adopted by the Court in S. C. 4 T. R. 570; Per Lord Mansfield, C. J., Goodtitle v. North, 2 Dougl. 584; Per Burrough, J., Parke v. Crole, 5 Bing. 70.[q]

(*g*) Supra, n. (*e*); Per Best, C. J., 5 Bing. 70;[q] Parker v. Norton, 6 T. R. 695; 1 Dougl. 4th ed. 168, n. (F. 4.)

(*h*) Goodtitle v. North, 2 Dougl. 583; Lloyd v. Peell, 3 B. & Ald. 407.[p]

(*i*) Parker v. Norton, 6 T. R. 695, recognized in Parker v. Crole, 5 Bing. 69, 70.[q]

(*k*) Parker v. Crole, 5 Bing. 63;[r] Forster v. Surtees, 12 East, 605, cited and distinguished per Best, C. J., 5 Bing. 70.[r]

(*l*) Lloyd v. Neele, 2 Chitt. R. 222.

(*m*) Lloyd v. Peell, 3 B. & Ald. 407.[s]

(*n*) Wilmer v. White, 6 Bing. 291.[t]

[o] Eng. Com. Law Reps. 14. [p] Id. 5. [q] Id. 15. [r] Id. 15. [s] Id. 5. [t] Id. 19.

2.—Executors and Administrators.

Liability of Personal Representatives before the stat. 3 & 4 Will. 4, c. 42, ss. 344, 345. Effect of that Statute as to their Liability, ss. 346, 347. Rule as to the Joinder of Executors, s. 348.

344. Previously to the stat. 3 & 4 Will. 4, c. 42, the remedy for a tort to the property of another, whether real or personal, such as trespass, trover, or case for waste, for diverting a watercourse, or obstructing lights, could not be enforced against the personal representatives *of the tort feasor ;(*a*) although, if chattels wrongfully in the possession of the testator or intestate continued still in specie in the hands of his executors, replevin or detinue would lie against the executor to recover back the specific goods.(*o*) So trover lies, the conversion being laid to have been by the executor.(*p*)

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345. Also by the stat. 30 Car. 2, st. 1, c. 7, explained and made perpetual by 4 & 5 Will. & M. c. 24, s. 12, the representatives of an executor or administrator who had wasted the goods of his testator or intestate were rendered liable; so that, since these statutes, if a judgment be had against an executor who afterwards dies, an action may now be brought against his executor or administrator upon the judgment, suggesting a devastavit by the first executor.(*q*) Another *apparent*(*r*) exception also to the general rule above stated occurred in the case of the executors of a prebendary,(*s*) parson, or incumbent of a benefice, who was liable to his successor, at common law, for dilapidations amounting to demolition, or where the buildings, hedges, and fences belonging to the benefice were left in a state of decay, *or where timber was felled for other purposes than repairs or fuel.(*t*)

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346. By stat. 3 & 4 Will. 4, c. 42, s. 2, which recites, that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another, in respect of his property real or personal; it is enacted, that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property real or personal, so as such injury shall have been committed within six calendar months before such person's death ;(*u*) and so as such action shall be brought within six calendar months after such

(*n*) 1 Wms. Saund. 216, n. (1); 2 Williams on Executors, 3rd ed. 1358. See Bacon v. Smith, 1 A. & E., N. S. 348.[a]

(*o*) Ib.; Le Mason v. Dixon, Sir W. Jones, 173, 174; Bro. Ab. Detinue, pl. 19.

(*p*) Per Lord Mansfield, C. J., Hambly v. Trott, 1 Cowp. 373; 2 Williams on Executors, 3rd. ed. 1358.

(*q*) 1 Wms. Saund. 219 c. d; 2 Williams on Executors, 3rd ed. 1357.

(*r*) Per Patterson, J., Bird v. Relph, 4 B. & Ad. 830;[x] 1 Wms. Saund. 5th ed. 216 a, n. (*a*.) (*s*) Radcliffe v. D'Oyly, 2 T. R. 630.

(*t*) Per Lord Denman, C. J., and Patteson, J., Bird v. Relph, 4 B. & Ad. 830;[a] Wise v. Metcalfe, 10 B. & C. 299.[b]

(*u*) As to what is sufficient evidence of a conversion within the six months, see Richmond v. Nicholson, 8 Scott, 134, which was an action of trover against an executor for a conversion by his testatrix.

[a]Eng. Com. Law Reps. 41. [x]Id. 24. [a]Id. [b]Id. 21.

executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

347. Where, under this statute, damages had been recovered in trespass against an administrator, for the tortuous raising and taking of coal from the plaintiff's land by the intestate during the six months prior to his decease, it was held, that an action for money had and received would also lie for the proceeds of so much coal as had been, previously to such six [*287] months, sold by the intestate, and in respect of which the remedy in tort was consequently barred by the statute;(x) and where, besides the tortuous act of the testator, property is acquired by him as a consequence thereof, it is clear, that an action in form ex contractu, for the value of such property, would, even where the stat. 3 & 4 Will. 4, c. 42, does not apply, survive against the executor; as in the case above cited, or in the instance of trees wrongfully cut down, or property wrongfully acquired and sold by the testator.(y) So, at common law, an action on the case will not lie against the executor of a common carrier on the custom of the realm, nor will an action of trespass lie, if testator take the horse of another and bring him back again; but in either case the declaration may be framed in assumsit, and the action will lie accordingly.(z)

347 *a*. For a tort committed to the person, it is clear that at common law no action can be maintained against the personal representatives of the tort feasor, nor does it seem that the recent stat. 9 & 10 Vict. c. 93, supplies any remedy against the *executors* or *administrators* of the [*288] party who by his "wrongful act, neglect, or default," has caused the death of another, for the 1st sect. of this Act renders that person liable to an action for damages "who would have been liable if death had not ensued," in which case, as above stated, the personal representatives of the tort feasor would *not* have been liable.(a)

348. Where executors are sued for their own wrongful act, the rules applicable to the joinder of defendants in ordinary cases will apply, and those only should be joined who have been guilty of the tort;(b) and therefore, if there are three executors, and one hath possession, detinue lies against him only.(c) When, however, the tort was committed by the deceased, as in an action of trover, where the conversion is laid to have been by him, it should seem that all the executors who have administered

(x) Powell v. Rees, 7 A. & E. 426;[c] The Bishop of Winchester v. Knight, 1 P. Wms. 406.

(y) Per Lord Mansfield, C. J., Hambly v. Trott, 1 Cowp. 373. 376, recognised 7 A. & E. 429;[c] Per Lord Kenyon, C. J., 3 T. R. 549; 1 Wms. Saund. 216, (1); Com. Dig. Administration, (B. 15).

(z) Per Lord Mansfield, C. J., Hambly v. Trott, 1 Cowp. 375; Per Sir J. Mansfield, C. J., Powell v. Layton, 2 B. & P. N. R. 370; Perkinson v. Gilford, Cro. Car. 579. Case seems always to have lain at common law against the executors of a deceased rector for permissive waste, Wise v. Metcalfe, 10 B. & C. 307, 308.[d]

(a) 1 Wms. Saund. 216 n. (1); 3 Bla. Com. 302; Com. Dig. Administration, (B. 15), 2 Inst. 382; Ireland v. Champneys, 4 Taunt. 884.

(b) Archb. Pl. & Ev. 2nd ed. 69; ante, ss. 300, 301.

(c) Bro. Ab. Detinue, pl. 19; Com. Dig. Abatement, (F. 10).

[c] Eng. Com. Law Reps. 34. [d] Id. 21.

should be made defendants, subject to a plea in abatement, with an averment, that a co-executor is alive and has administered.(*d*) An action was brought against A. B. & C. as executrix and executors of one J. T., for a debt due from the testator. B. & C. severally pleaded plene administravit, except as to the sum of £383 6*s*. 7*d*.; and also except as to certain goods and chattels; the defendant took judgment against A. for the assets [*289] admitted to be in her hands, and judgment of assets in futuro as to the residue against the three; the goods were thereupon seized, and sold under a fi. fa., and A. alone gave a cheque on the bankers with whom the £383 6*s*. 7*d*. was deposited, which was dishonoured, because not signed by B. & C.; the plaintiff then brought an action of debt against A. alone, suggesting a devastavit. Held, that the defendant was clearly liable in such action, and that she was conclusively bound by her admission of the possession of assets in the former action.(*e*)

(*d*) Archb. Pl. & Ev., 2nd. ed., 70; 1 Wms. Saund. 291 g; ante, p. 197, n. (*b*)
(*e*) Cooper v. Taylor, 7 Scott, N. R. 950.

APPENDIX.

No. I.—Remarks as to the Common Law Liability of Members of Railway Companies.

The ordinary rules which have been already laid down, with reference to the liabilities of Principal and Agent, will, it is believed, be found applicable in determining the respective liabilities of parties engaging as members of Railway Companies. Now the stat. 7 & 8 Vict. c. 110, s. 4, provides that a company shall be entitled to a certificate of provisional registration when the proposed name of the intended company, the business and purpose of the company, and the names, occupations, places of business, and residence of its promoters have been registered, and we shall therefore consider the existence of the company as commencing with its provisional registration, merely observing, that in some instances a certificate of provisional registration is obtained by the promoters, before any steps have been taken towards the formation of a committee, or managing body, and before any expenses have in fact been incurred, whereas, in other cases, parties have previously agreed to co-operate in the undertaking, as members of the provisional or managing body. No prospectus nor advertisement can however be issued *before a certificate of provisional [*292] registration has been obtained, and the liability of parties who may have entered into contracts prior thereto will depend in all respects upon the principles which have been already laid down as applicable to ordinary contracts. Assuming, then, that the company has obtained its certificate under the above-mentioned statute, we shall proceed to consider the liability which attaches to a member of the managing body. I. When the provisional is identical with the managing committee. II. When the managing committee is elected or appointed by the provisional committee. III. When the provisional and managing committees, although co-existent, are independent of each other. It is believed that every case which can occur in practice will be found to fall within one or other of the above three classes.

I. In the case first supposed it is evident that the managing body must be either altogether self-constituted or must be called into existence by persons proposing at some future period, *i. e.*, as soon as shares shall be issued, to become shareholders in the company, and with respect to the

liability of such parties, the remarks in a case(*a*) already cited seem directly applicable: "when persons meet to prepare the measures necessary for calling the society into existence, attendance on such meeting and concurrence in such measures may be strong evidence that any individual there present and taking part in the proceedings held himself out as a paymaster to all who executed their orders;" if, therefore, expenses are [*293] incurred by the committee *prior to the issue of shares in the undertaking, and in pursuance of resolutions passed at the preliminary meeting of persons interested in the prosecution of the undertaking, it seems clear that parties attending at such meeting, and assenting to such resolutions, will be liable for the expenses so incurred.

It will, in the next place, be convenient to remark that the managing body of a railway company is by no means on the footing of an ordinary trading co-partnership: its position seems to be much more analagous to that of the committee of a club; and the distinction between these two is obvious, for where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole, and may, in ordinary transactions, bind the partnership by his act; but a tradesman who has supplied goods to a club "cannot recover against a member of the committee, unless he shews that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf;"(*b*) that is to say, in the latter case the agency must be proved, whereas, in the former, it is implied by law. It is clear that in order to fix the member of the committee of a railway company with liability for goods supplied to the commitee, *some* proof must be given that the party sought to be charged either concurred in giving the order, or has recognised and assented to it when given. Before any allotment of shares has been made, and before, [*294] consequently, any capital has been *raised for meeting expenses incident to the preliminary operations, a member of the acting committee must indeed be presumed to have authorized that body to pledge his individual credit for goods to be supplied for their use, and for other reasonable and necessary expenses; but even in this case the question as to liability is one of fact, and not of law, and it will be for the jury to infer from the defendant's conduct whether he did not give authority to some one to pledge his credit for such things as might be necessary for carrying on the concern.(*c*) Where, however, a subscription has been entered into for liquidating the preliminary expenses, or when funds have been raised in the usual manner, by issuing shares in the undertaking, it is clear that the inference to be drawn by the jury will be the reverse of that just mentioned; for, as observed by Alderson, B., in a recent case,(*d*) "if A. gives money to B. to do a certain act, the natural inference is that B. is to spend the money, and not pledge A.'s credit; but if A. gives B. authority to do something, but gives him no money for the purpose, then he may pledge the credit of his principal for what is necessary."(*e*) Inasmuch, then, as the liability of a member of the managing body of a rail-

(*a*) Lake v. The Duke of Argyll, 6 Q. B. 478, 479, ante, p. 168.
(*b*) See the judgments of Lord Abinger, C. B., and Parke, B., in Flemyng v. Hector, 2 M. & W. 172.♦
(*c*) See Bartlett v. Lambert, 10 Jur. 416.
(*d*) Bartlett v. Lambert, supra.
(*e*) See Flemyng v. Hector, 2 M. & W. 172.♦

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way company depends upon the proof of *agency* in every case when the contract in question was not made by him in person, it seems, on principle, that he would not be bound by the act of the majority of the committee, provided he expressly dissented therefrom, in which *case neither *actual* nor *implied* authority for such act from the dissentient member could of course be shewn. "It might be," remarks [*295] the learned baron(*f*) whose words we have already quoted, "that the majority only gave authority, and that the defendants dissented from it. If so, I should think they only were liable who voted for it." Such a case, however, is, we believe, in general, and certainly ought to be, provided for, either by the resolutions adopted by the committee for its internal management, or by the express terms of the subscribers' agreement; and in the absence of any such provisions, it will at all events be necessary for the member sought to be charged in respect of a contract entered into by order of the committee, to shew that he was one of the minority who dissented from giving the order. Mere absence, however, of the defendant from the committee, on any particular occasion, would seem to imply *assent* rather than *dissent*, and would not, it is conceived, raise any presumption favourable to him. The power, moreover, of the majority of the committee to bind the minority, and of present to bind absent members, by any particular act or contract done or entered into by them, will depend upon its quality and nature. For instance, if a bill of exchange were accepted by several members of the committee acting as such, in pursuance of a formal resolution, and with a view to raising money for the purposes of the company, it is apprehended that those members only would be liable whose [*296] names *were on the bill, or who had expressly authorized its acceptance.(*g*) Where scrip has been issued, and the subscribers' agreement has consequently been signed, the powers entrusted to the directors will be ascertained by reference to that deed, and we need only observe that these powers, which are in general sufficiently ample, must be strictly pursued. The authority of the committee is necessarily limited to such acts as may be within the contemplation of the clauses of that deed by which the affairs of the company are regulated. When they act in violation of those rules they exceed the authority which is delegated to them, and their acts are void, and cannot be binding on any member of the committee who has not expressly assented to them.(*h*) It is quite clear that when a party becomes a member of the committee of a railway company he will not be liable for goods supplied, or on any contract entered into prior to the period of his joining the concern, unless, indeed, he use the goods or ratify the contract, in which case he would, according to the ordinary rule that *ratihabitio retrotrahitur*, be responsible.(*i*)

II. In cases where the managing committee is selected by the provisional committee out of its own body, and invested with general powers for carrying out the objects of the company, the liability or non-liability of a member

(*f*) Todd v. Emly, 8 M. & W. 508,[♦] and Bartlett v. Lambert, 10 Jur. 417.
(*g*) See per Lord Abinger, C. B., 2 M. & W. 179.[♦] Ante, p. 165.
(*h*) See Per Coltman, J., with reference to a benefit society. Tyrell v. Woolley, 2 Scott, N. R. 181, per Lord Abinger, C. B., 2 M. & W. 179, 180.[♦]
(*i*) Bartlett v. Lambert, 10 Jur. 415. See Kerridge v. Hesse, 9 C. & P. 200.[a]

[a] Eng. Com. Law Reps. 38. [♦] Reprinted at $2.50. per vol.

of the provisional committee who has assented to this delegation of autho-
[*297] rity will depend upon whether *the act done, and on which he is sought to be charged, was or was not within the general scope of the authority thus delegated. This question will, in most cases, be for the jury; and the difficulty which may be felt in answering it will be found to result from the fact that the powers delegated to the acting body are usually very ill-defined. It seems, however, that the remarks already made as to the liability of a member of the managing committee for the acts of his co-directors will in general apply when a question arises as to the liability of a member of the provisional committee for the acts of that body to which he has himself agreed to entrust the management of the concern. And since cases falling strictly within the class to which we have here adverted are certainly of rare occurrence, we shall proceed, thirdly, to offer some remarks with reference to cases in which the provisional and managing committees are co-existent but independent of each other.

III. The principal difficulty here consists in determining whether the strict rule applicable to the case of an *ostensible* partner in a trading firm applies also to that of a provisional committee-man who has simply allowed his name to appear as such to the world, but who has not in any way interfered in the management of the company. The rule as to the liability of an ostensible or nominal partner in a trading concern has been already stated,(*k*) and may be illustrated by the case of Guidon v. Robson.(*l*) There, a merchant carrying on trade on his own separate account introduced into his
[*298] *firm the name of a clerk who did not partake in the profits of the business, but continued to receive a fixed salary. And Lord Ellenborough, C. J., ruled that the nominal partner was to be considered in all respects as a partner as between himself and the rest of the world, and that, where the name of the real person is introduced with his own consent, it is immaterial what agreement there may be between him and those who share the profit and loss. "They are," observed his lordship, "equally responsible, and the contract of one is the contract of all."(*m*) Now, this decision depends upon a principle which is altogether inapplicable to the case of a railway undertaking, viz., that one partner is an agent for his co-partners for trading purposes, and the case cited merely shows that the same principle must be applied where a person who is not really a partner holds himself out to the world as such. We have already stated our belief that the individual members of the managing committee of a railway company are not, *by implication of law*, agents for each other, or for the entire body; but that *some* proof must be given of express or implied authority to them to act as such. It must be observed, moreover, that the test usually applied for determining whether or not a trading partnership exists, *quoad* third persons, viz., the participation of the parties in the profits of the concern,(*n*)
[*299] is manifestly inapplicable in the case of a *railway company. To such a company we apprehend that the law of principal and agent,

(*k*) Ante, p. 107.
(*l*) 2 Camp. 302. Per Eyre, C. J., Waugh v. Carver, 2 H. Bla. 246. Ante, pp. 64. 167.
(*m*) Unless, perhaps, where it can be shewn that the plaintiff was not aware that the party had held himself out as a partner, and had not, consequently, given him credit. See per Tindal, C. J., Holcroft v. Hoggins, L. J., N. S., C. P. 129. Ante, p. 172.
(*n*) Potts v. Eyton, C. P. Trin. T., May 22, 1846.

and not that which regulates ordinary partnerships, must be applied; and we therefore conclude that a provisional committee-man, who has merely allowed his name to appear as such in the prospectus and advertisements of a railway company, will not, as a matter of legal inference, be liable for the acts of the managing committee, unless he has either taken part in their appointment, or has in some way interfered with, or acquiesced in, their proceedings. The law was thus laid down by Parke, B., in the case of Law v. Wilson, recently tried before him; and the ruling of this learned judge was approved of by Pollock, C. B., in the subsequent case of Banks v. Goode, at the Nisi Prius sittings after last Trinity term.(*o*) It likewise seems to have been followed in several other Nisi Prius cases, which have not yet appeared in the regular reports.

We may further remark, that if there be (as we have already suggested) any analogy between the respective positions of the committee of a club, and of a railway company, the judgments in Todd v. Emily, and Flemyng v. Hector, which certainly deserve, with reference to this subject, an attentive perusal, may be called in aid of the conclusion, which we have submitted to the reader. The proper questions then for the jury in an action against a provisional committee-man will substantially be: First, whether the defendant authorized *the insertion of his name in the list of the provisional committee; and secondly, whether he authorized the [*300] managing committee, or their agents, to pledge his credit for the debts of the concern. If the first of these questions should be answered in the affirmative, but no evidence be given to shew a delegation of authority by the defendant ultrà the fact of his consent to be a member of the provisional committee, the second of the above questions will it is conceived, become one of law merely, and the verdict will have to be entered for the defendant; unless, indeed, where the plaintiff relies upon the terms of the prospectus, as shewing a delegation of authority by the provisional committee as a body, in which case this document will, under the circumstances supposed, receive its true construction from the court: and if its construction should be such as that contended for by the plaintiff, the verdict will of course be entered for him.(*p*)

As regards the *shareholders*, it seems quite clear that they are not partners in the concern *quoad* the public; they merely contribute towards raising certain funds for liquidating the expenses incidental to the undertaking, and certainly cannot be considered as expressly or impliedly authorizing the managing directors to pledge their credit for any purpose whatsoever.(*q*) *Where, however, the terms of the prospectus have been complied with as regards the allotment of shares and the subscription of the [*301] necessary capital, and the conditions precedent to the formation of the com-

(*o*) These cases are not yet reported, except in "The Law Times," vol. vii. 236. 286. Acc., Parrett v. Blunt, Id. 287; Sheridan v. Whitington, Id. 433, cor. Parke, B.; Lambert v. Knill, Id. 409. See Barker v. Birt, 10 M. & W. 61.*

(*p*) The above remarks have been confined to that point which appears to us to be of the most practical importance, with reference to the liability of provisional committee-men. It will of course be remembered that the provisions of the deed of settlement may in any particular case have a very material bearing upon the question of liability.

(*q*) Ante, p. 294.

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pany have consequently been fulfilled, it cannot be doubted that a partnership exists as between all parties embarking as shareholders in the concern.(r) The application for shares, however, and payment of the deposit will amount to nothing "if the shares subscribed for are so few that the concern cannot proceed, and the scheme must necessarily be abortive;" and in this case, according to a recent and well-known decision, the amount of the deposit may be recovered back:(s) providing there be evidence to shew that the scheme has in fact been abandoned.(t) Even where the subscribers' agreement has been executed it will, according to the case of Wontner v. Shairp,(u) be a question for the jury in an action for recovery of the deposit, whether the deed was executed by the plaintiff with the same understanding as the money was paid, or whether he was induced to execute it by any misrepresentation as to the actual position of the concern.

[*302] We shall conclude these remarks with referring the *reader to the case of Day v. Sharp, already noticed,(x) where it was held, that an action would lie at suit of the secretary of a railway company, who had previously been a member of the provisional committee of the company against the defendant, being liwewise a member of the same committee, there being evidence to shew that the defendant had assented to the change in the plaintiff's position; and had agreed that he should cease to hold the character of committee-man, and should assume that of secretary: this decision appears to have proceeded on the ground that the defendant was by his own acts estopped from setting up the partnership as a defence to the action. It was expressly decided in Lucas v. Beach,(y) that one shareholder may maintain an action against another shareholder in an undertaking in respect of a contract entered into prior to the existence of the partnership *inter se;* and this decision is quite in accordance with established principles.

No. II.—Joint Stock Companies.

The recent statute 7 & 8 Vict. c. 110, intituled, An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies, contains several provisions which have a direct bearing upon the subject of parties to actions, but which can only be briefly noticed in a work like the present.

[*303] *Sect. 25, empowers the company, when completely registered, to sue and be sued by their registered name in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not, so long as any such claim may remain unsatisfied.

With respect to s. 26, it has been decided that the sale of scrip in railway companies provisionally registered is not prohibited thereby; this was held by the Court of Exchequer in Young v. Smith, East. T. January 26,

(r) Holmes v. Higgins, 1 B. & C. 74,[b] recognized Lucas v. Beach, 1 Scott, N. R. 350.
(s) Walstab v. Spottiswoode, 15 L. J., N. S., Ex. 193. 198; Pitchford v. Davis, 5 M. & W. 2; Nockells v. Crosby, 3 B. & C. 814.[c]
(t) Smith v. Newcomb, cor. Patteson, J., at Lincoln Midsummer Assizes, 1846.
(u) Cor. Erle, J., June 23, 1846.
(x) Ante, p. 60, but see Holmes v. Higgins, 1 B. & C. 74.[d] (y) 1 Scott, N. R., 350.

[b]Eng. Com. Law Reps. 8. [c]Id. 10. [d]Id. 8.

1846, and by the Court of Queen's Bench in the subsequent case of Lawton v. Hickman, the judgment in which was delivered at the sittings after the last Trin. Term. It is hardly necessary to observe that this decision is most important with reference to all questions arising between the vendor and vendee of scrip, and the right of the latter to recover the purchase-money where there has been a total failure of consideration.(z)

Sects. 44, 45, and 46, regulate the manner in which contracts (including bills of exchange, promissory notes, and deeds,) shall be entered into on behalf of the company, and the liability which shall be incurred thereby.

Sect. 66 enacts that every judgment in any action against the company "shall and may take effect, and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also if due diligence shall have been used to obtain satisfaction of such judgment, &c. by execution against the property and effects of such company then against *the person, property, and effects of any shareholder for the time being, or any former shareholder of such company, in [*304] his natural or individual capacity, until such judgment, &c. shall be fully ratisfied. Provided in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement for which such judgment, &c. may have been obtained, was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, &c. being obtained. Provided also, that in no case execution be issued on such judgment, &c. against the person, property, or effects of any such former shareholder of such company after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company."

Sect. 67 provides for the reimbursement of shareholders against whom execution has issued, either by recovering against the company, or by enforcing contribution from the other shareholders, in like manner as contribution may be enforced in ordinary cases of copartnership.

Sect. 68 regulates the proceedings to be taken in execution against the person or property of a shareholder.

The statute 7 & 8 Vict. c. 111, intituled "An Act for facilitating the winding up the affairs of Joint Stock Companies unable to meet their pecuniary engagements," provides (s. 2) that "the bankruptcy of any such company or body in its corporate or associated capacity, (as the case may be) shall not be construed to *be the bankruptcy of any member of such [*305] company or body in his individual capacity."

And sect. 8 empowers the assignees of the estate and effects of the company to sue any person, whether member of such company or not, for any debt or demand on behalf of the company.

The statute 8 & 9 Vict. c. 16, is intituled "An Act for consolidating in one Act certain provisions usually inserted in acts, with respect to the constitution of companies incorporated for carrying on undertakings of a public nature," the 25th Sect. of this act empowers the company to enforce the payment of calls by action.

Sect. 36 enacts, that, if any execution either at law, or in equity, shall

(z) See Leeman v. Lloyd, 14 L. J., N, S., Q. B., 165.

have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company, not then paid up.

Sect. 37 enacts, that, if by means of any such execution any shareholder shall have paid any sum of money beyond the amount then due from him, in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company.(*a*)

Sect. 97 points out the various modes in which contracts may be entered into by the directors, on behalf of the company, and enacts that, "All contracts made according to the provisions herein contained shall be [*306] *effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be, and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought either by or against the company as might be brought had the same contracts been made between private persons only."

Sect. 100 provides that the directors shall not be personally liable, and that they "shall be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them."

Lastly. By stat. 9 & 10 Vict. c. 28, intituled "An Act to facilitate the Dissolution of certain Railway Companies," it is provided (s. 25) "that the resolution to dissolve the company, or the actual dissolution thereof, shall not alter or affect the rights of creditors or other persons not being shareholders in the company, nor any engagements whatsoever which the committee may have entered into;" and sect. 31 provides "that where the dissolution of a company shall have been resolved under this act, if judgment shall have been recovered, or shall afterwards be recovered in any action against any member of the committee, for any debts due from such company, or from such committee, in respect of the undertaking, the member against whom such judgment shall have been recovered shall be entitled at law to a contribution from each of the other members of such committee towards the payment of the moneys recovered by such judgment, and of [*307] all costs *and expenses in relation thereto, of such a share of the whole amount of such moneys, costs, and expenses, as would have been borne by such respective member upon an equal contribution by all the members of such committee, and may recover the contributions to which he may be so entitled, or any of them, by action or actions of debt, or on the case against all or any such other members of such committee, but so that no such member shall be liable in any such action as aforesaid, for more than the share to which he shall respectively be liable to contribute under this provision."

(*a*) As to proceedings against the shareholders in public companies, see Bradley v. Eyre, 11 M. & W. 433; Bradley v. Warbury, Id. 452; Clowes v. Brettel, Id. 461; Beech v. Eyre, 6 Scott N. R. 327.

No. III.—Joint Stock Banks.

Joint Stock Banks in England are now regulated by the provisions of the recent statute 7 & 8 Vict. c. 113, of which act, sect. 1 enacts "That it shall not be lawful for any company of more than six persons to carry on the trade or business of bankers in England after the passing of this act (5th Sept., 1844,) under any agreement or covenant of copartnership made or entered into on or after the 6th day of May last past, unless by virtue of letters-patent to be granted by her Majesty, according to the provisions of this act; but nothing herein contained shall be construed to restrain any such company established before the said 6th day of May, for the purpose of carrying on the said trade or business of bankers in England, from continuing to carry on the same trade and business as legally as they might have done before the passing of this act, until letters-patent shall have been granted to them severally on *their application as hereinafter provided to be made, subject to the provisions of this act." [*308]

The act further provides (s. 6) that the company may be incorporated by letters-patent, to be granted by the Crown; (s. 7,) that incorporation shall not limit the liability of the shareholders; (s. 8,) "that no action or suit by or against the company shall be in any wise affected by reason of the plaintiff or defendant therein being a shareholder or former shareholder of the company; but any such shareholder, either alone or jointly with another person, as against the company, or the company as against any such shareholder, either alone or jointly with any other person, shall have the same action and remedy in respect of any cause of action or suit whatever which such shareholder or company might have had if such cause of action or suit had arisen with a stranger."

Sect. 10 provides that execution upon any judgment may be issued against the property and effects of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for the creditor to have execution in satisfaction of such judgment against the person, property, and effects of any shareholder, or, in default of thus obtaining satisfaction against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose; provided that no person having ceased to be a shareholder of the company shall be liable for any debt for which he would not have been liable as a partner, or for which judgment shall have been obtained, after the expiration of three *years from the time when he shall have ceased to be a shareholder of such company.(a) [*309]

Sects. 11, 12, 14 and 15, provide for the reimbursement of individual shareholders out of the property and effects of the company, or in default thereof by contribution from the other shareholders.

(a) As to proceedings under 7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96, see Esdaile v. Lund, 12 M. & W. 607;♦ Steward v. Dunn, Id. 655; Lyon v. Haynes, 6 Scott, N. R. 371; Davidson v. Bower, 5 Scott, N. R. 538; Philipson v. The Earl of Egremont, 6 Q. B. 587; Bosanquet v. Woodford, 5 Q. B. 310;[a] Fowler v. Rickerby, 3 Scott, N. R. 138; Steward v. Greaves, 10 M. & W. 711;♦ Crellin v. Calvert, 14 M. & W. 11;♦ Ransford v. Bosanquet, 2 Q. B. 972.[b]

[a] Eng. Com. Law Reps. 48. [b] Id. 42. ♦Reprinted at $2.50 per vol.

Sect. 13 points out the manner in which a judgment creditor of the company may obtain execution against an individual shareholder, and provides that "such execution may be issued by leave of the court or of a judge of the court in which such judgment, &c. shall have been obtained upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or dismiss such motion (as the case may be,) and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit."

Sect. 22 enacts, that all bills of exchange or promissory notes may be made, accepted, or endorsed, in any manner provided by the deed of partnership, so that they be signed by one of the managers or directors of the [*310] company, and be by him expressed to be so *made, accepted, or endorsed by him on behalf of such company. The same section further provides "that the manager shall not be personally liable on any bill or note so signed by him; and that the company may sue and be sued thereon as fully as in the case of any contract made and entered into under their common seal."

Sect. 31 authorizes the directors to make calls, and sect. 33 empowers the company to enforce payment of such calls by action.

Sect. 47 confers on existing banking companies carrying on business within sixty-five miles of London, and not within the statute, the power of suing and of being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff or defendant on behalf of such company. And sect. 48 enacts, that banking companies shall be deemed trading companies within the stat. 7 & 8 Vict. c. 111.

No. IV.—Stat. 7 & 8 Vict. c. 66.

By stat. 7 & 8 Vict. c. 66, intituled "An Act to amend the Laws relating to Aliens," it is enacted (sect. 3,) that every person now born or hereafter to be born out of Her Majesty's dominions of a mother being a natural born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors or administrators, any estate real or personal by devise or purchase or inheritance of succession.

Sect. 4 enacts, that from and after the passing of this act every alien, being the subject of a friendly state, shall and may take and hold, by pur- [*311] chase, gift, *bequest, representation or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural born subject of the United Kingdom.

Sect. 5 enacts, that every alien now residing in, or who shall hereafter come to reside in any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, repre-

sentation or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or occupation by him or her, or his or her servants, or for the purpose of any business, trade or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions and privileges, except the right to vote at elections for members of parliament, as if he were a natural born subject of the United Kingdom.

Sect. 6 enacts, that upon obtaining the certificate, and taking the oath hereinafter prescribed, every alien now residing in, or who shall hereafter come to reside in any part of Great Britain or Ireland, with intent to settle therein, shall enjoy all the rights and capacities which a natural born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's privy council, nor a member of either House of Parliament, nor of enjoying such other rights and capacities, if any, as shall be specially excepted in and by the certificate to be granted in manner hereinafter mentioned.

*No. V.—Statute 9 & 10 Vict. c. 95. [*312]

The following sections of the recent stat. 9 & 10 Vict. c. 95, intituled, "An Act for the more easy Recovery of Small Debts and Demands in England," have been already referred to in the course of this work.

Sect. 64 enacts, that it shall be lawful for any person under the age of twenty-one years to prosecute any suit in any court holden under this act, for any sum of money not greater than twenty pounds, which may be due to him for wages or piece-work, or for work as a servant, in the same manner as if he were of full age.

Sect. 65 enacts, that the jurisdiction of the county court under this act shall extend to the recovery of any demand not exceeding the sum of twenty pounds, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will.

Sect. 66 enacts, that it shall be lawful for any executor or administrator to sue and be sued in any court holden under this act, in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in any superior court.

Sect. 68 enacts, that where any plaintiff shall have any demand recoverable under this act, against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process, and judgment may be obtained and execution issued against the person or persons so served, notwithstanding that others jointly liable may not have been served and sued, or *may not be within the jurisdiction of the court; and every such person against whom judgment shall have been obtained [*313] under this act, and who shall have satisfied such judgment, shall be entitled to demand and recover in the county court, under this act, contribution from any other person jointly liable with him.

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